IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1757

MARY WHITNEY RENZ, as a beneficiary under the CHARLOTTE P. HYDE TRUST and the NELL P. CUNNINGHAM TRUST and the CHARLOTTE P. HYDE TESTAMENTARY TRUST; FRANKLIN W. RENZ, as Executor under the Last Will and Testament of MARY P. WHITNEY who was a beneficiary under the CHARLOTTE P. HYDE TRUST and the NELL P. CUNNINGHAM TRUST and the CHARLOTTE P. HYDE TESTAMENTARY TRUST; FRANKLIN W. RENZ, as Executor under the Last Will and Testament of MARY P. WHITNEY, and MARY WHITNEY RENZ, derivatively and in the right and for the benefit of FINCH, PRUYN & COMPANY, Inc.,

Petitioners,

against

LYMAN A. BEEMAN and MARY H. BEEMAN, individually and as Trustees of the CHARLOTTE P. HYDE TRUST and the NELL P. CUNNINGHAM TRUST, both created the 14th day of June, 1954; LYMAN A. BEEMAN, SAMUEL P. HOOPES, THOMAS E. MEATH, LYMAN A. BEEMAN, JR. and ELMER S. WHITE, as Trustees of a Trust established under Agreements dated January 16, 1969, with MARY H. BEEMAN and SAMUEL P. HOOPES; LYMAN A. BEEMAN, MARY H. BEEMAN and SAMUEL P. HOOPES as Trustees under the CHARLOTTE P. HYDE TESTAMENTARY TRUST; MARY H. BEEMAN and SAMUEL P. HOOPES as Beneficiaries under the NELL P. CUNNINGHAM TRUST; LYMAN A. BEEMAN, individually and as Director, Chairman of the Board and Chief Executive of FINCH, PRUYN & COMPANY, Inc.; THOMAS E. MEATH, individually and as Director and President of FINCH, PRUYN & COMPANY, Inc.; LYMAN A. BEEMAN, JR., individually and as Director and Senior Vice-President of FINCH, PRUYN & COMPANY, Inc.; SAMUEL P. HOOPES, individually and as Director and Vice-President of FINCH, PRUYN & COMPANY, Inc.; MARY H. BEEMAN and ELMER S. WHITE, individually and as Directors of FINCH, PRUYN & COMPANY, Inc.; and FINCH PRUYN & COMPANY, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

ARTHUR F. McGINN, Jr.
Attorney for Petitioners
41 State Street
Albany, N. Y. 12207
(518) 436-7684

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Pruyn & Company, Inc.; THOMAS E. MEATH, individually and as Director and President of Finch, Pruyn & Company, Inc.; LYMAN A. BEEMAN, Jr., individually and as Director and Senior Vice-President of Finch, Pruyn & Company, Inc.; SAMUEL P. HOOPES, individually and as Director and Vice-President of Finch, Pruyn & Company, Inc.; MARY H. BEEMAN and ELMER S. WHITE, individually and as Directors of Finch, Pruyn & Company, Inc.; and FINCH, PRUYN & COMPANY, Inc.,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit on its judgment entered in this case.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit is reported at 589 F.2d 735 (1978) (A. 1). The opinion of the Court of Appeals of the Second Circuit denying petitioners' petition for reargument is not yet reported (A. 45). The opinion of the District Court for the Northern District of New York is not yet reported (A. 46).

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was dated and entered on November 16, 1978. The judgments of the Court of Appeals for the Second Circuit refusing to rehear this matter *in banc* and denying rehearing were dated and entered on January 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented for Review.

I. Did the Court of Appeals err in finding that trustees who violated their fiduciary duty by purchasing stock are not equitably estopped from relying on the statute of limitations because of the lack of affirmative intentional acts or concealment amounting to fraud?

II. Did the Court of Appeals err in finding that, if there were such equitable estoppel, enough was stated by the trustees, even in the absence of full disclosure, to require the beneficiaries to pursue further inquiry with diligence?

Statement of the Case.

On September 24, 1974, the beneficiaries of an express family trust commenced this action against their trustees for breach of fiduciary duty. The basis of federal court jurisdiction is diversity of citizenship.

Respondents are trustees of several 1954 family trusts of shares which have voting control of Finch, Pruyn & Company, Inc., a New York corporation.

In 1958, respondent and trustee Lyman Beeman, chief executive officer of the corporation, entered into negotiations on behalf of the corporation for the purchase of voting and equity shares held by the Metropolitan Museum of Art. As a result, respondent and trustee Mary Beeman, Lyman Beeman's wife, personally purchased from the Museum one-fourth of the corporation's voting

shares and the corporation purchased the equity shares held by the Museum. The Beemans, in their personal and trustee capacities, then had almost absolute voting control. Such absolute control was attained by additional purchases of voting stock by respondent Mary Beeman. Both the District Court (A. 47 to 66) and the Court of Appeals (A. 13 to 23) recite the facts of the case at length.

The Court of Appeals reversed the District Court and found that the purchase of voting shares by respondent Mary Beeman for her personal account is a breach of her fiduciary duty as a trustee of the 1954 trusts. However, the Court of Appeals permitted the trustees to insulate themselves behind a ten year statute of limitations. Petitioners' claim that respondents are equitably estopped from asserting the statute of limitations was denied because of the lack of affirmative or intentional acts of concealment amounting to fraud on the part of the trustees.

The Court of Appeals went further. It held that, in a 1963 letter *to one beneficiary,* enough was stated by a trustee to require the *beneficiaries* to pursue further inquiry with diligence and, thereby, foreclosed all beneficiaries from asserting equitable estoppel. Full disclosure was not required of the trustees as a condition precedent to their effective refuge in the statute of limitations.

Argument.

In reversing the District Court, the Court of Appeals upheld the timeless precepts of Judge Cardozo in *Meinhard v. Salmon,* 249 N.Y. 458 (1928). However, in permitting errant trustees refuge in a statute of limitations, the Court decimates New York trust law and forces

all New York trust beneficiaries to engage in a continuous over-the-shoulder relationship with their trustees.

Appellants are painfully aware of this Court's reluctance to review a decision of a Court of Appeals relating to State law. We submit that the denial of a writ in this case would elevate reluctance to the status of immutable procedure.

New York is obviously the situs of many private trusts which involve national and international beneficiary relationships. The trust law of New York is a touchstone for the laws of many States which, by force of population and financial activity, do not become involved or relate readily to complex fiduciary relationships.

The decision of the Court of Appeals is an invitation to the trustees of long-term private and family trusts to indulge in the exercise of partial reports and gimmickry to trigger a statute of limitations whenever they engage in a questionable practice. The requirement of *full disclosure* to avoid estoppel has been finessed from the law of trusts in New York.

Appeals courts usually address the fiduciary relationship on motions to dismiss which require complaints to be taken as pleaded. In that context, the practical effects of strong statements in support of fiduciary relationships is judicially harmless—the parties are returned to the trial court. Here, there has been a trial without a jury and the Court of Appeals reversed an eminent and one of the most experienced trial judges in the federal judiciary to find a breach of fiduciary duty. Its failure to "go all the way" gives substance to the adage that hard cases make bad law.

This case is "hard" only because the trustees are not outright thieves. There was no showing of fraudulent or intentional concealment of the breach of their fiduciary duty. (Appellants are bound by that finding on this appeal.) The Court of Appeals finds that "nice," although errant, trustees will not be estopped from claiming protection of a statute of limitations. We submit that its reasoning as well as result is an especially unfortunate marking of the half-century "old" precepts of *Meinhard v. Salmon, supra.* Unless this Court acts, *Renz v. Beeman,* 589 F.2d 735 (1978) will become a "but see" footnote in trust case books that continue to publish Judge Cardozo's opinion.

POINT I.

A trustee under an express trust is estopped from relying on the statute of limitations until there has been full disclosure of a breach of trust.

This Court's finding that equitable estoppel is not available in this case is contained in the following sentence (A. 36, 589 F.2d at 750):

> Equitable estoppel is not available to toll the statute in all cases of fiduciary breach, even if there was a breach of an initial duty to disclose. *See Scheuer v. Scheuer,* 308 N.Y. 447, 126 N.E.2d 555 (1955).

The Court then refers to a line of six cases—only one of them arising from an express trust—in which equitable estoppel was applied where there were affirmative fraudulent statements. There were no affirmative fraudulent statements in the instant case (appellants are bound by that finding on this appeal).

We submit that the Court of Appeals misapprehends the law by framing a question which assumes that equitable estoppel is available *only* when there are affirmative fraudulent statements:

> The question then is whether, in the absence of fraudulent conduct by the trustee *when he committed the breach of duty,* he can be estopped from pleading the statute of limitations because of his conduct after the breach occurred. (A. 36, 589 F.2d at 750. Emphasis added.)

The Court's misapprehension is also evident from its statement that

> We think that the test for timely knowledge under the doctrine of equitable estoppel is similar to that set forth with regard to fraud in CPLR §213(8)—"could with reasonable diligence have discovered it." (A. 40, 589 F.2d at 751-752.)

The Court also makes reference to "an *initial* duty to disclose" (A. 36, 589 F.2d at 750. Emphasis added.) We have not been able to find any judicial authority for the notion that there is a separate *initial* duty. In the context of the statute of limitations and equitable estoppel, the cases assume that there is a *continuing* duty to disclose which tolls the statute of limitations until there is actual full disclosure. *O'Hayer v. De St. Aubin,* 30 A.D.2d 419 (4th Dept. 1968).

We submit that the Court's reliance on *Scheuer* is misplaced. In *Scheuer,* plaintiff sought to impose a constructive trust based on an *oral* promise to convey real property. *Erbe v. Lincoln Rochester Trust,* 13 A.D.2d 211, 215 (4th Dept. 1961) appeal dismissed 11 N.Y.2d 754 (1962), describes *Scheuer* in the following terms:

> The plaintiff therein sought to toll the Statute of Limitations by reason of an oral promise in the face of a statute (Civ. Prac. Act, §59) which requires a promise to be in writing to have that effect. This the court refused to permit. In passing we note that, as we read the sentence from the opinion in the *Scheuer* case on page 452—quoted in the dissenting opinion herein—the court was not referring to the extension of the doctrine of equitable estoppel but to the extension of "the settled doctrine of equity that the statute of frauds may not be raised as a bar to the granting of relief, by way of constructive trust." The court declined to extend that doctrine (not the doctrine of equitable estoppel) by "analogy" to the Statute of Limitations problem before the court in that case. This obviously has no relevancy in this case.

At that time, section 59 of the Civil Practice Act provided that

> §59. Acknowledgment or new promise must be in writing.
>
> An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take a case out of the operation of the provisions of this article relating to the limitations of time within which an action must be brought other than for the recovery of real property. But this section does not alter the effect of a payment of principal or interest.

While the Court of Appeals is certainly correct in stating that fraudulent affirmative statements will raise an equitable estoppel, the more basic rule, often cited in New York cases, is set forth in *Developments in the Law —Statutes of Limitations,* 63 Harv. L. Rev. 1177, 1214-15 (1950):

> To establish a cause of action for fraud or mistake the plaintiff must have been unaware of the wrong at the time it was done; such proof is of course not necessary to an action for a breach of fiduciary duty. Nevertheless, the two types of actions have been accorded similar special treatment under statutes of limitations, which is justified because here too the plaintiff will not ordinarily learn of the wrong for some time after the defendant's defalcation. This consideration is especially appropriate to the express formal trust, a relationship used frequently for the preservation and management of property for the young, infirm, or inexperienced, who are unlikely to have sufficient business acumen to determine when a breach has occurred. Indeed, the beneficiary of a trust is generally forbidden to interfere in the management of the res. [footnotes omitted]

We have been unable to find *any* case which has favored the trustee of an express trust by permitting resort to a statute of limitations. We submit that the courts should and do go to great lengths to avoid such applications. The rationale is expressed well in *Dawson, Fraudulent Concealment and Statutes of Limitation,* 31 Mich. L. Rev. 875, 887-8 (1933):

> Even the strictest tests of fraudulent concealment dissolve in the shadowy fields of confidential and fiduciary obligation. It has already been pointed out that the existence of such relationships will tend very strongly to excuse delay in claims based on direct misrepresentation. But all courts would go far beyond this. Even without actual fraud a claimant will ordinarily be justified in the expectation that the person on whom such obligations are imposed will conform to them strictly and in good faith. *The absence of direct misrepresentation is supplied by an affirmative obligation to make full disclosure, and the non-disclosure itself is "fraud."*

> The typical violation of confidential or fiduciary obligation is the secret misappropriation of property held in a fiduciary capacity, or the securing of secret profits which rules of law forbid. In States that employ the "fraud" exception, suspension of the statute of limitations in such cases is everywhere achieved by labelling such conduct "fraud." Where the "fraudulent concealment" exception is used, courts are equally willing to describe mere non-disclosure as "concealment." Particularly is this true in long-term relationships, such as those involving trustees, executors, and guardians, where wide opportunities for misappropriation may exist and prompt discovery may be more difficult. *In these fiduciary relationships the expectations of the beneficiary are further protected by the independent rule that the statute will not run in equitable actions until notice of the fiduciary's misconduct is brought home to the beneficiary.* In other situations, where this equitable rule is not so readily invoked, the courts have employed the "fraudulent concealment" exception to accomplish similar results. [emphasis added, footnotes omitted]

New York Civil Practice by Weinstein, Korn and Miller repeatedly cites with favor those two law journal articles in its treatment of equitable estoppel. At ¶201.13, Vol. 1, pages 2-32, it states

> It has been said that a finding of fraudulent concealment requires some affirmative act of misrepresentation by the defendant. But, where there is a fiduciary relationship between the parties, the fiduciary will be held to a higher standard, and if he *fails to disclose* facts which he has a duty to reveal, he will be guilty of *fraudulent concealment.* [emphasis added, footnotes omitted]

The articles are also cited with favor in *Erbe v. Lincoln Rochester Trust,* 13 A.D.2d 211, 213 (4th Dept. 1961) *appeal dismissed,* 11 N.Y.2d 754 (1962) which holds

> It is a familiar principle that "when a defendant electing to set up the statute of limitations has previously, by deception or *any violation of duty* towards plaintiff, caused him to subject his his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which the court will not allow him to hold." [emphasis added]

See, also, *Matter of Pettit,* 38 Misc.2d 818 (Surr. Ct., Nassau Cty. 1963).

O'Hayer v. De St. Aubin, 30 A.D.2d 419, 427 (4th Dept. 1968) briefly sets forth the New York law in regard to an express formal trust:

> The failure of full disclosure of the facts by the trustee to the appellant tolled the statute (1 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 201-13, p. 2-21 . . .) [now p. 2-32].

We submit that in the instant case *no* statute of limitations began to run until there was full affirmative disclosure. Here we have an express trust with the trustees being held to the higher fiduciary duty.

> "The statutory period * * * does not begin to run until the administrator has *openly repudiated* his obligation to administer the estate" [citations omitted]. It is also settled that for the trustee to set up the Statute of Limitations as a bar, mere lapse of time is not sufficient, but an act of repudiation is necessary [citations omitted]. *Matter of Barabash,* 31 NY2d 76, 80 (1972).

The Court of Appeals found that Lyman and Mary Beeman violated their fiduciary duty in purchasing the stock. Its decision contains conjecture and speculation that they acted without being conscious of the breach (A. 34-35, 589 F.2d at 749). The purported letter dated September 10, 1963 is quoted and found to be ambiguous but not an intentional concealment (A. 38, 589 F.2d at 750-51). However, the rule remains that the statute of limitations does not run or, at least, it is tolled until there is *full disclosure. O'Hayer, supra.* Certainly, neither a possible ignorance of the law on the part of the trustees nor a finding of no intentional concealment should prejudice the innocent beneficiaries. Taken together they do not begin to reach the standard of full disclosure set by the foregoing cases and authorities.

POINT II.

The September 10, 1963 letter was not a sufficient disclosure to trigger the commencement of the statute of limitations.

Actually, the Court of Appeals does not hold directly that the statute of limitations began to run on September 10, 1963. Rather (A. 39, 589 F.2d at 751) the Court states that "enough was stated to require the appellants, in the circumstances, to pursue further inquiry with diligence." Even if this were a valid conclusion (which we do not concede for any purpose), the question arises as to when the breach of fiduciary duty was fully disclosed to the appellants.

The sole basis for the court's finding of disclosure sufficient to trigger a duty of inquiry was the purported letter (Defendants' Exhibit H, A. 78). It was received

in evidence over an objection based on the Dead Man's Statute (A. 83-86) with the following exchange between the court and appellants' attorney:

> The Court: I am going to receive it. I reflected upon it and read the case, and I don't see any harm in its content.
> Mr. McGinn: I don't see it either, but could I have a ruling from you.
> The Court: I am going to allow it. We have not gotten any conversations yet. *I don't quite follow it yet.*
> Mr. McGinn: The reason also on the introduction of that letter is, *that I don't want to waive any right.*
> The Court: I will receive it (A. 85, emphasis added.)

Lyman Beeman was the witness when the letter was placed into evidence and neither he nor any other witnesses gave one word of testimony with respect to it. The fact that this letter exists and was introduced into evidence without any proof of when it was written, if it was delivered, when or if it was sent or, if sent, to whom, is clearly not sufficient to toll the statute of limitation against the appellants. The letter without such proof is void of any probative value. It is inconceivable that this is sufficient to impose on these appellants a duty to inquire which, if not exercised, constitutes a waiver of a proven breach of the respondents' fiduciary duty. Without the letter, the earliest possible event which could have imposed a duty to inquire was the Renz-White meeting in 1969 (A. 23, 589 F.2d 744, fn. 9). If so, there is no problem with the statute of limitations.

There is no other evidence in the record which makes this letter in any way binding on the beneficiaries. This is especially true of the beneficiaries in the persons of

Mary Renz and Louis Whitney and succeeding generations, who could not know of its existence, and whose interests are recognized by the Court (A. 30 to 32, 589 F.2d at 747-748).

The Court then cites and quotes (A. 40, 589 F.2d at 751) *Augstein v. Levey*, 3 A.D.2d 595, 598, 162 N.Y.S.2d 269, 273 (1957), *affirmed*, 4 N.Y.2d 791, 173 N.Y.S.2d 27, 149 N.E.2d (1958) for the proposition that

> When plaintiffs possess "timely knowledge" sufficient to place them "under a duty to make inquiry and ascertain for themselves all the relevant facts," courts should "not view with favor a claim of estoppel grounded in fraud."

We submit, most respectfully, that that selective quotation is not a fair statement when *Augstein* is compared to the facts in the instant case. No trust was involved in *Augstein* where plaintiffs had been given a prospectus minutely describing the transactions on which their claims were based. There only "evidentiary details confirmatory of the basic facts" remained to be discovered (3 A.D.2d at 598).

Four additional cases are cited in the same paragraph in support of the same proposition:

Sielcken-Schwarz v. American Factors, Ltd., 265 N.Y. 239, 246, 192 N.E. 307, 310 (1934)	Plaintiff had alleged the facts constituting his claim in complaints in prior actions.

Higgins v. Crouse, 147 N.Y. 411, 416, 42 N.E. 6, 7 (1895)	Actions for fraud—general term reversed—defendant estopped from pleading statute of limitations because of plaintiff's lack of knowledge of the fraud.
Klein v. Bower, 421 F.2d 338, 343-44 (2d Cir. 1970)	By affidavit, plaintiff admitted timely knowledge of the basic facts constituting the fraud.
Talmadge v. United States Shipping Board, 54 F.2d 240, 243 (2d Cir. 1931)	Plaintiff was specifically advised by letter that the larceny (fraud) had occurred.

We submit that none of those cases applies to the fiduciary situation present in the instant case and that the following are more appropriate:

Erbe v. Lincoln Rochester Trust Co., 3 N.Y.2d 321, 326 (1957)	"Generally, knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute . . . ."
Friedman v. Meyers, 482 F. 2d 435, 439 (2d Cir. 1973)	"Suspicion will not substitute for knowledge of facts from which fraud could reasonably be inferred. [citations omitted] . . . Nor can the essential knowledge be founded on constructive notice based on the recordation of the Schwartz lease in the County Clerk's office."

Schmidt v. McKay, 555 F. 2d 30, 37 (2d Cir. 1977)

> "Under New York law the issue of when a plaintiff, acting with reasonable diligence, could have discovered an alleged fraud turns upon whether the plaintiff possessed knowledge of facts from which he could reasonably have inferred the fraud; although the plaintiff may not shut his eyes to facts which call for investigation, mere suspicion will not suffice as a ground for imputing knowledge of the fraud."

We submit that, at least until 1969, appellants did not have even an inkling of facts that might have led to further inquiry finding a breach of fiduciary responsibility.

Two further comments with respect to appellants' knowledge are suggested by Judge Moore's concurring opinion (A. 42-43, 589 F.2d at 752-53). He finds "some significance adverse to plaintiffs" in making serious charges and withdrawing them before trial without tendering proof. We submit that the significance of that development is that it demonstrates the appellants' and their attorneys' abysmal lack of knowledge when the complaint was drafted. It demonstrates that there was little or no business communication between Connecticut and Glens Falls.

Secondly, he refers to the "press announcement of Mrs. Foulds' death in 1958 and her bequest of F-P

stock to the Met . . . ." The Glens Falls newspaper article was not admitted into evidence and there is absolutely nothing in the record to indicate that any "press announcement" reached into Vermont or Connecticut.

It is so clear now. The detailed knowledge acquired in pre-trial discovery and set before the court makes it very difficult to portray the ignorance which existed at the time when, and before, the complaint was drafted. We ask that this Court consider the wise dicta of Judge Collin in *Cortello v. Cortello,* 209 N.Y. 252, 262 (1913):

> A wisdom developed after an event and having it and its consequences as a source is a standard no man should be judged by.

In all of this discussion under Point II we have been tracking the court's decision which, after finding there had not been "intentional concealment," went on to impose an obligation of "further inquiry" on appellants. We submit that no basis for such an obligation is, or could be, shown after the court's reversal of the trial court with its resounding application of *Meinhard v. Salmon,* 249 N.Y. 458 (1928).

In approaching the issue of equitable estoppel as it applies to the statute of limitations and where defendants-trustees have been found lacking, the court should look to cases involving trustees. In those cases it is uniformly held that the statute of limitations does not begin to run or, at least, it is tolled until there is *full disclosure* of a breach of fiduciary duty by the trustees of an express trust. *O'Hayer v. De St. Aubin,* 30 A.D.2d 419 (2d Dept. 1968). For the trustees of an express trust to rely on a statute of limitations,

"The law requires proof of a repudiation by the fiduciary which is *clear* and made known to the beneficiaries" (emphasis in text). *Matter of Barabash,* 31 N.Y.2d 76, 80 (1972).

Conclusion.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR F. McGINN, JR.,
Attorney for Petitioners,
Office and Post Office Address,
41 State Street,
Albany, New York 12207
Telephone: (518) 436-7684.

ROBERT M. BROWN,
Of Counsel.

APPENDIX.

Decision of Second Circuit Court of Appeals.

MARY WHITNEY RENZ, as a beneficiary under the Charlotte P. Hyde Trust and the Nell P. Cunningham Trust and the Charlotte P. Hyde Testamentary Trust; FRANKLIN W. RENZ, as Executor under the Last Will and Testament of Mary P. Whitney who was a beneficiary under the Charlotte P. Hyde Trust and the Nell P. Cunningham Trust and the Charlotte P. Hyde Testamentary Trust; FRANKLIN W. RENZ, as Executor under the Last Will and Testament of Mary P. Whitney, and MARY WHITNEY RENZ, derivatively and in the right and for the benefit of Finch, Pruyn & Company, Inc.,

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and as Director and Senior Vice-President of Finch, Pruyn & Company, Inc.; SAMUEL P. HOOPES, individually and as Director and Vice-President of Finch, Pruyn & Company, Inc.; MARY H. BEEMAN and ELMER S. WHITE, individually and as Directors of Finch, Pruyn & Company, Inc.; and FINCH, PRUYN & COMPANY, Inc.,

Appellees.

No. 915, Docket 78-7007

United States Court of Appeals,
Second Circuit.

Argued June 14, 1978.

Decided Nov. 16, 1978.

Action was brought to impose a constructive trust on 2,000 shares of voting preferred stock purchased by trustee of a family trust, which controlled family corporation through ownership of a majority of voting stock, and to remove trustees from said position. The United States District Court for the Northern District of New York, James T. Foley, Chief Judge, dismissed complaint for failure to show by preponderance of evidence that defendants had breached their fiduciary duties and for failure to bring action within period provided by applicable statute of limitations. The Court of Appeals, Gurfein, Circuit Judge, held that: (1) district court's finding of implied consent to said purchase by trust beneficiaries was clearly erroneous; (2) exculpatory clauses in trust agreement did not justify district court's lowering of standard of trustee's obligation from that of undivided loyalty to good faith; (3) trustees committed a breach

of trust when trustee purchased 2,000 shares of voting stock through negotiations conducted by cotrustee; (4) district court's finding that there was no fraudulent intent was not clearly erroneous, and (5) action was barred by New York statute of limitations.

Dismissal of complaint affirmed except with respect to putative transactions held to be not barred by statute of limitations; judgment of dismissal vacated for further proceedings.

Moore, Circuit Judge, filed concurring opinion.

1. Trusts—110

In action by beneficiary of a family trust, which controlled a family corporation through ownership of a majority of voting stock, to impose a constructive trust on 2,000 shares of voting stock purchased by defendant trustee, who was also beneficiary of trust, on her own behalf through negotiatons conducted by her husband, cotrustee and president of corporation, trial court's finding that defendant trustees acted "in good faith" was not clearly erroneous.

2. Trusts—110

In action to impose a constructive trust on 2,000 shares of voting stock purchased by a trustee-beneficiary of a family trust, district court's finding that corporate changes, whereby voting preferred shares were replaced by a new class A voting, 2,000 additional voting shares were authorized, restriction requiring ⅔ approval for issuance or disposition of new voting stock was removed and shareholders' preemptive rights and cumulative voting for directors were abolished, were made in good faith

in furtherance of corporate objectives was not clearly erroneous. Business Corporation Law N.Y. §717.

3. Trusts—171

Although 2,000 voting shares, which were purchased by defendant trustee-beneficiary of a family trust, which controlled a family corporation through ownership of a majority of voting stock, for herself, in breach of trust, were deposited by her in management trust created by her and her brother so as to hold a majority of outstanding voting shares, creation of management trust itself was not a breach of trust, for brother and sister had right to pool their interests.

4. Trusts—110

In action by beneficiary of a family trust which controlled a family corporation through ownership of a majority of voting stock, to impose a constructive trust on 2,000 shares of voting stock purchased by defendant trustee-beneficiary for herself, through negotiations conducted by her husband, president of corporation and her co-trustee, the Court of Appeals would accept district court's assessment of credibility and let stand its finding that negotiations for said purchase were conducted with no attempt at concealment; however, district court's finding of implied consent to purchase by trust beneficiaries was clearly erroneous.

5. Trusts—231(1)

Consent to self-dealing on part of trustee must be "clearly proved" and made with a full knowledge of all material particulars and circumstances, including full extent of cestui's legal rights.

6. Trusts—231(1)

Under standard of undivided loyalty imposed upon trustees, law stops inquiry when relation is disclosed and sets aside transaction, or refuses to enforce it, at instance of party whom fiduciary undertook to represent, without undertaking to deal with question of abstract justice in the particular case.

7. Trusts—231(1)

A trustee's duty of "utmost loyalty" can be reduced by means of language in trust instrument permitting certain transactions involving self-interest, or by express consent of settlor; such exculpatory clause or agreement reduces standard of duty to one of good faith and permits a court to weigh merits of transaction.

8. Trusts—231(1)

Exculpatory clauses in trust agreement concerning matters relating to management of trust corpus, which gave trustees broad discretion to exercise powers and rights incident to ownership of trust property, and assumingly established a good-faith business judgment in handling of trust investments, but which did not grant to trustees right to prefer their own interests to those of trust, or to appropriate for their own account trust opportunities, did not justify a lowering of standard of trustee's obligation from that of undivided loyalty to one of good faith.

9. Trusts—231(1)

Only the most explicit language can protect a fiduciary from liability in a conflict of interest with his cestuis.

10. Trusts—171

Courts may not read exculpatory language in trust broadly, lest they unwittingly permit erosion of fiduciary duty itself.

11. Trusts—231(2)

Trust agreement, which contained exculpatory clauses concerning matters relating to management and which gave trustees broad discretion to exercise powers and rights incident to ownership of trust property, contained no express exculpation permitting competition with trust in purchase of voting stock and with it core of control that comprised corpus of trust.

12. Trusts—231(1)

Absent exculpation or clear consent, it is existence of conflict alone that establishes obligation of trustee.

13. Trusts—231(1)

Conflict can arise when a trustee becomes a competitor with trust for a business opportunity.

14. Trusts—231(1)

A trustee violates his duty to beneficiary if he enters into a substantial competition with interest of beneficiary.

15. Trusts—173

Trustee's favoring of one beneficiary over others may be a source of conflict.

16. Trusts—231(2)

On remand, if shares acquired by trustees of a family trust which controlled a family corporation through ownership of a majority of voting stock were purchased from treasury of corporation out of either 8,000 initially authorized shares or 2,000 additional shares subsequently authorized, without an offer to participate to other beneficiaries of trust, district court could find a breach of trust and fashion an appropriate remedy.

17. Trusts—239

Trustee of family trust which controlled a family corporation through ownership of majority of voting stock had fiduciary obligation to preserve joint control created by settlors; by putting shares for control into a single basket, settlors pledged trustee not to disarrange balance of control that had been created.

18. Trusts—231(2)

Purchase of common stock by corporation and of preferred stock by trustee of a family trust, which controlled corporation through ownership of a majority of voting stock, through negotiations conducted by trustee's husband, a cotrustee and president of corporation, and a family member, was both fair and based upon appraisal, and thus no breach of duty could be inferred from dual rule of cotrustee.

19. Trusts—231(1)

The absence of self-dealing does not measure limit of fiduciary obligation.

20. Trusts—231(2)

An opportunity for purchase that comes to trustee while in a fiduciary capacity compels trustee to give a right of first refusal to his trust estate if opportunity fits purpose of trust.

21. Trusts—231(1)

When trust is settled by two branches of a family, who jointly own control of family company chancellor will insist that a trustee with ties to one branch should not disfavor the other; to upset balance of control for selfish gain is to commit a breach of high fiduciary duty of undivided loyalty.

22. Trusts—231(2)

When voting stock of corporation became available for sale, it was duty of trustee of family trust, which controlled corporation through ownership of majority of voting stock, to notify life tenants, who because of their powers of appointment could have given binding consent to purchase, and to offer stock to corporation as a means of preserving balance of control between the two families, and if corporation was unwilling to make purchase, opportunity should have been offered to trust, or to beneficiaries in proportion to their interests; at the least, trustee should have petitioned for court approval for trustee to purchase voting stock for herself.

23. Trusts—231(1)

Duty of a trustee is absolute: trustee shall not place himself in a position where his interest is or may be in conflict with his duty.

24. Trusts—231(2)

Trustees of a family trust, which controlled a family corporation through ownership of a majority of voting stock, committed a breach of trust when one of trustees purchased 2,000 shares of voting stock on her own behalf, in competition with trust, through negotiations conducted by cotrustee.

25. Limitation of Actions—6(2)

Cause of action to impose a constructive trust on 2,000 shares of voting preferred stock purchased by trustee of a family trust, which controlled family corporation through ownership of a majority of voting stock, and to remove trustees from said position accrued in August, 1962, prior to effective date of new statute, and thus was barred by New York ten-year statute of limitations for equitable causes of action. CPA 53.

26. Limitation of Actions—37(1), 99(1)

When dealing with statute of limitations, there is a line of cleavage not always clearly discernible between conduct which is a breach of fiduciary duty and conduct which is intentionally fraudulent; when there is a breach of fiduciary duty, without fraudulent intent, action in equity is governed by New York statute prescribing rule with respect to causes of action which accrued prior to effective date of enacting legislation, and limitations period expires at end of six years from last act of breach. CPLR N. Y. 203(1), 218(b).

27. Trusts—232

It did not follow from fact that trustees of family trust committed a breach of fiudciary duty that they were also guilty of fraud; to make a cause of fraud, it was necessary to show that trustees intentionally sought to defraud trust beneficiaries.

28. Trusts—110

In action by beneficiary of a family trust, which controlled family corporation through ownership of majority of its voting stock, to impose a constructive trust on 2,000 shares of voting stock purchased by trustee on her own behalf through negotiations conducted by her husband, cotrustee and president of corporation, trustees were not proved guilty of fraud by preponderance of evidence; in any event, "reasonable diligence" should have discovered fraud more than two years before complaint was filed. CPLR N.Y. 203(f), 213, subd. 8.

29. Limitation of Actions—13

Equitable estoppel is not available to toll statute of limitations in all cases of fiduciary breach, even if there was a breach of an initial duty to disclose; rather, it is invoked when defendant's affirmative misconduct, after his initial breach of duty, produced long delay between accrual of cause of action and institution of legal proceeding.

30. Limitation of Actions—13

Equitable estoppel may arise so as to toll statute of limitations when plaintiff is about to institute suit and is lulled into security by promises which defendant does not intend to fulfill but upon which plaintiff relies, only to find that statute of limitations has run.

31. Limitation of Actions—13

Equitable estoppel may arise so as to toll statute of limitations when defendant misrepresents to plaintiff time within which he may begin suit.

32. Limitation of Actions—13

Equitable estoppel may arise so as to toll statute of limitations when affirmative fraudulent statements are made which conceal from plaintiff facts essential to make out the cause of action.

33. Limitations of Actions—13

As an appellate court, the Court of Appeals could not say that district court's finding that there was no intentional concealment of purchase by trustee of family trust, which controlled a family corporation through ownership of a majority of voting stock, of 2,000 shares of voting stock on her own behalf was clearly erroneous so as to estop trustee from pleading statute of limitations, in action to impose a constructive trust on voting shares purchased by trustee. Fed. Rules Civ. Proc. rule 52(a), 28 U.S.C.A.

34. Limitations of Actions—13

When plaintiffs possess "timely knowledge" sufficient to place them under a duty to make inquiry and ascertain for themselves all relevant facts, court should not view with favor a claim of estoppel grounded in fraud.

35. Limitation of Actions—100(12)

All that is needed to commence running of statute of limitations is knowledge of facts sufficient to suggest to a person of ordinary intelligence the probability that he has been defrauded.

36. Limitation of Actions—103(4)

Where beneficiaries of family trust, which controlled family corporation through ownership of a majority of voting stock, were told extent of trustee's holding and could have easily discovered that trustee could not own so many shares by inheritance alone, they were in a position by simple inquiry to discover details of trustee's purchase of 2,000 shares of voting stock for herself, and, in such circumstances, statute of limitations for bringing action to impose constructive trust on voting shares purchased by trustee was not tolled.

Arthur F. McGinn, Jr., Albany, N. Y. (Robert M. Brown and Arthur F. McGinn, Jr., P. C., Albany, N. Y., of counsel), for appellants.

Rogers M. Doering, New York City (Thomas M. Bistline and Simpson Thacher & Bartlett, New York City, of counsel), for appellees Lyman A. Beeman and Mary H. Beeman.

Jacob H. Herzog, Albany, N. Y. (James M. Reilly and Pattison, Herzog, Sampson & Nichols, P. C., Albany, N. Y., of counsel), for appellee Lyman A. Beeman, Jr.

Warner M. Bouck, Albany, N. Y. (Bouck, Holloway & Kiernan, Albany, N. Y., of counsel), for appellee Samuel P. Hoopes.

John T. DeGraff, Jr., Albany, N. Y. (DeGraff, Foy, Conway & Holt-Harris, Albany, N. Y., of counsel), for appellee Thomas E. Meath.

Donald D. DeAngelis, Albany, N. Y. (Hinman, Straub, Pigors & Manning, Albany, N. Y., of counsel), for appellee Elmer S. White.

Before Moore, Mulligan and Gurfein, Circuit Judges.

Gurfein, Circuit Judge:

This is an action based on diversity of citizenship, filed on September 24, 1974 in the District Court for the Northern District of New York (Hon. James T. Foley, Chief Judge) in which plaintiffs seek to impose a constructive trust on 2000 shares of voting preferred stock in Finch, Pruyn and Co., Inc. (Finch-Pruyn), purchased by Mary Beeman through negotiations conducted by her husband, Lyman A. Beeman, on August 8, 1962, and to remove the Beemans as trustees of certain trusts. The plaintiffs are Mary Whitney Renz, suing individually, and her husband, Franklin W. Renz, suing as executor of the estate of Mary H. Whitney, Mrs. Renz's mother. The Beeman's are trustees of several *inter vivos* trusts executed simultaneously in 1954 (referred to compositely as the "1954 Trust"), under which appellant Mary Renz is

now a beneficiary. After trial on the merits, the District Court held, inter alia, that the Beemans did not breach their fiduciary duty to the plaintiffs by purchasing the Finch-Pruyn stock, and that the plaintiffs' claim is barred under New York's Statute of Limitations. We agree that the action is barred by limitations and affirm on that ground.

On the standard of fiudciary responsibility to be applied, we agree with the District Court in some respects but differ in others. To state the issues summarily, the District Court recognized that the trustees owed a general duty of undivided loyalty to the trust beneficiaries. Judge Foley found, though somewhat equivocally, that there was not enough circumstantial evidence to support a finding that the life tenants, who also had powers of appointment, had relieved the fiduciaries of their duty by consenting to the purchase of the 2000 shares. He ruled, however, that certain clauses in the trust instrument exculpated the trustees with respect to this transaction. The court, accordingly, applied the lesser standard of good faith rather than the greater standard of undivided loyalty that it might have applied in the absence of exculpation or consent.

[1] Since the trial court heard the witnesses, including the parties, and assessed their credibility, we cannot say that the court's finding that Lyman Beeman and Mary Beeman acted "in good faith" was clearly erroneous, and we shall accept the conclusion as a finding of fact when we consider the statute of limitations. On the other hand, we find neither exculpation nor consent, and we are convinced that the duty of the Beemans should have been measured by the higher standard of undivided loyalty rather than good faith. We will, therefore, consider the statute of limitations from that point of view as well.

I

To put the defense of limitations in its proper setting, we must engage in a tedious recital of the genealogy of the Pruyn family, united by blood, but estranged in later generations by competing ambitions. For over a century, the fortunes of the family have been closely tied to the business it controls. The Finch-Pruyn Co. was originally formed as a partnership in Glens Falls, New York, in 1865. Throughout its history, the company has manufactured paper products. It was incorporated in 1904, and the newly formed corporation issued 8000 shares of preferred stock and 37,500 shares of common stock. Only the preferred stock carried voting rights. Both classes of stock were divided equally between Samuel Pruyn and the Jeremiah W. Finch family. By means of purchases from the Finch family, Samuel Pruyn increased his holdings in Finch-Pruyn to a two-thirds interest.

By the terms of Samuel Pruyn's will, probated in 1909, he bequeathed remainders after his wife's life estate to his three daughters in *equal* parts, and made them *equal* residuary legatees. His 5334 shares of voting preferred stock were placed in trust, however. The trust was to be measured by the lives of Pruyn's two grandchildren, Mary Van Ness Hyde (Mrs. Mary Hyde Whitney, mother of plaintiff Mary Renz) and Samuel Pruyn Hoopes (father of defendant Samuel Hoopes, Jr.). Upon the expiration or termination of the trust, the corpus was to be distributed to the testator's "next of kin" by consanguinity. The trustees were empowered to terminate the trust at an earlier time. The trustees had the right to vote the stock and thus to control Finch-Pruyn.[1] The testator named his son-in-law, Maurice Hoopes, and a lawyer,

[1]The trustees were empowered to sell the preferred shares in a block, but they were restrained from selling "a part only."

Brown, as trustees. The survivor trustee was given the power to appoint successors, and Maurice Hoopes, in due course, named as successor trustees his daughter and son-in-law, Mary and Lyman Beeman. Lyman also became President of Finch-Pruyn in 1949. In 1954, the Beemans terminated the testamentary trust pursuant to an express power under the will.

If the testamentary trust had been allowed to expire only on the death of Mary Hyde Whitney (and assuming her mother, Charlotte Pruyn Hyde, and her aunt, Nell Pruyn Cunningham, died first), the corpus of Finch-Pruyn voting stock would have been divided equally between the Hoopes and Hyde families. Since Mrs. Cunningham was without issue, Mary Hoopes Beeman, Samuel Hoopes, Jr., Louis Whitney, and Mary Whitney Renz would each have received equal shares of the stock. The District Court found that when Beeman terminated the testamentary trust, *outright* ownership of the Pruyn family's voting stock in Finch-Pruyn was distributed as follows: Nell Pruyn Cunningham—1778⅔ shares; Charlotte Pruyn Hyde—1777⅔ shares; Mary Hoopes Beeman—888 5/6 shares; and Samuel P. Hoopes, Jr.—888 5/6 shares.[2]

Immediately thereafter Mrs. Cunningham, Mrs. Hyde and Mary Beeman made an agreement dated June 14, 1954 which created three *inter vivos* trusts in a single instrument called the 1954 Trust.[3] The new trusts held 4434 1/6 shares, a *majority* of the outstanding voting shares of Finch-Pruyn. The settlors named both Lyman A. Beeman and Mary Beeman to be the trustees, though

[2]Mary and Samuel took directly because Mrs. Mary Pruyn Hoopes, the third sister, was already dead.

[3]Mrs. Cunningham and Mrs. Hyde placed all their shares in trust; Mary Beeman placed 777⅝ shares in trust, retaining 111 shares outright. Samuel P. Hoopes, Jr., put none of his 888⅝ shares into the trust.

the trust provided that there shall at all times be one "disinterested trustee". It must be assumed that although Mary Beeman was a beneficiary, her husband Lyman was deemed "disinterested" enough to protect the interests of each family. The Beemans have continued as trustees until the present.[4]

The 1954 Trust grants to the trustees broad powers to vote the stock, to retain or sell trust property, to enter into various business arrangements with others on behalf of the trust property, and generally "to do all such acts, take all such proceedings, and exercise all such rights and privileges . . . as if the absolute owner thereof." The trust also contains an exculpatory clause which states that "[t]he decision of the Trustees with respect to the exercise or non-exercise by them of any discretionary power hereunder, or the time or manner of the exercise thereof, made in good faith, shall fully protect them and shall be conclusive and binding upon all persons interested in the trust estate." Lyman A. Beeman, as sole "disinterested" trustee, is given power to terminate the trust at will.

Both Mrs. Hyde and Mrs. Cunningham reserved testamentary powers of appointment under the 1954 Trust. Neither of them ever exercised that power. Mrs. Cunningham died in July 1962. Her interest in her trust devolved upon Mary Beeman, Samuel Hoopes, Jr., and Mary Hyde Whitney (plaintiff's mother), as remaindermen, each of whom received 592 8/9 shares. Thus, when on August 8, 1962 Mary Beeman purchased, in a transaction to be described, 2000 additional shares, the plaintiff's

[4]Elmer S. White, who was at the time an officer of Finch-Pruyn, served as substitute trustee for Mr. Beeman from 1963 to 1969. During that period Mr. Beeman traveled extensively abroad.

mother, Mary Hyde Whitney, was *already* a direct beneficiary of the 1954 Trust.[5]

Mrs. Hyde died in 1963, and Mary Hyde Whitney, appellant Mary Renz's mother, died in 1971. Appellant then succeeded to a life interest in the corpus of both the *Hyde* and *Cunningham* Trusts.

The key triggering event for this action filed on September 24, 1974 is Mary Beeman's purchase on August 8, 1962, twelve years earlier, of 2000 additional shares of Finch-Pruyn voting preferred. Helen Finch Foulds, one of the heirs of the Finch side of the business, died in November 1958. She bequeathed 2000 shares of voting preferred and 6300 shares of non-voting common stock to the Metropolitan Museum of Art in New York City. Shortly after probate, Metropolitan's agent, J. P. Morgan & Co., wrote to Lyman Beeman in his capacity as President of Finch-Pruyn to advise him of Metropolitan's acquisition. A series of letters was exchanged which the District Court characterized as the "initial steps toward negotiating the purchase of the Fould[s] stock." Lyman Beeman acted as negotiator for the purchase, though it is not clear on whose behalf he was negotiating.

In December 1958, only a month after Mrs. Foulds' death, Elmer White, Vice-President of Finch-Pruyn, wrote to a co-executor of the Foulds estate: "We note that the 2000 shares of preferred stock has been appraised at $120. per share and we believe that this is a realistic value. In the event this stock is placed on the market, we are interested in purchasing same at this price." The "we" unmistakably refers to the corporation. The letter was signed "Finch, Pruyn and Company, In-

[5]The Hoopes family had just acquired an edge in beneficial interests in the voting shares through Mrs. Cunningham's trust.

corporated, Elmer S. White, Vice-President." Nor was Mr. White in 1958 a trustee of the 1954 trusts. The record does not indicate a reply to the *corporation's* offer concerning the voting preferred shares, nor does it disclose when or to whom Mary Beeman was first proposed as a purchaser in place of the corporation.

It appears that the Metropolitan wished to sell both the voting preferred and the non-voting common stock as a single block. After 3½ years, an agreement was reached under which the Finch-Pruyn Company purchased the non-voting common stock at $140 per share and Mary Beeman purchased the voting preferred at $120 per share. The District Court determined that these prices were fair and we see no reason to disturb that finding. Lyman Beeman, who was at that time co-trustee with his wife of the 1954 Trust, acted as negotiator for both purchases. The purchase of the common stock was approved by Finch-Pruyn's Board of Directors on August 21, 1962, but the minutes reflect neither that the 2000 shares of voting stock were also available for purchase nor that Mrs. Beeman was buying them. The shares acquired by Mrs. Beeman in these circumstances were not put into the 1954 Trust but were held by her outright. As will later be discussed, we consider the purchase by Mrs. Beeman to have been in breach of trust.

[2] There are two subsequent events which appellants also contend involve breaches of fiduciary duty. First, in 1967 and 1968, Finch, Pruyn and Company's certificate of incorporation was amended; the voting preferred shares were replaced by a new Class A voting common; 2000 additional voting shares were authorized; the restriction requiring ⅔ approval for issuance or disposition of new voting stock was removed; and shareholders' preemptive rights and cumulative voting for directors were abolished. The trust shares were, of course, voted to ef-

fect these changes.[6] It is claimed that both the Beemans, as trustees, and the corporate directors breached their fiduciary duty to plaintiffs as a result of these actions. The District Court, however, found that these corporate changes were made in good faith in furtherance of corporate objectives. *See Greenbaum v. American Metal Climax, Inc.*, 27 A.D.2d 225, 231, 278 N.Y.S.2d 123 (1967); N. Y. Business Corp. Law §717 (McKinney 1963). This finding is not clearly erroneous. The breach of trust was the 1962 purchase of the Foulds stock.

Second, more than six years after the 1962 purchase of the Foulds shares, in 1969, Mary H. Beeman and her brother, Samuel Hoopes, Jr., entered into a set of agreements referred to below as the Management Trust. Mrs. Beeman deposited into the trust the 2360 shares she held outright (including the 2000 from the Foulds purchase) and Mr. Hoopes deposited 888 5/6 shares, for a total of 3248 5/6. Mrs. Beeman also agreed to exercise her testamentary power of appointment under the 1954 Trust to transfer her beneficial interest in 777 5/6 shares of voting stock to the Management Trust, which, upon the exercise of her already committed power of appointment would have 4026⅔ shares, a majority of the 8000 voting shares outstanding.[7]

[3] The creation of the Management Trust itself was not a breach of trust, for the brother and sister had the right to pool their interests. Without the purchase of the 2000 Foulds shares in 1962, of course, it would not have owned an absolute majority of the voting stock.

[6]The 2000 additional voting shares have not been issued.

[7]The Management Trust is to terminate in 1990 with the generation of Mary Beeman's grandchildren and Samuel Hoopes, Jr.'s children, or earlier in the event of the deaths of all Mary's grandchildren, by vote of three trustees.

Since the purchase was the only breach of trust, the statute of limitations is measured from that breach.[8]

As we mentioned at the outset, Judge Foley found it unnecessary to pass on the fiduciary obligations with respect to the Foulds stock that would be implied by the standard of undivided loyalty. In a thoughtful opinion, he appraised the termination of the testamentary trust and the simultaneous creation of the 1954 Trust as the product of a desire to extend Pruyn family control of Finch-Pruyn; and as evidence of "the confidence which the senior members of the Pruyn family placed in Lyman A. Beeman's stewardship" of the company. He found that purchase of the 2000 Foulds shares did not contravene the Beemans' duties in carrying out these purposes, because: (1) there was no attempt at concealment of the transaction; (2) although no express consent to the purchase was proven, such consent could be implied from the circumstances; and (3) the purchase was within the discretion afforded to the trustees by exculpatory language in the trust agreements.

With regard to the court's evaluation of the purposes behind the 1954 Trust, we cannot say that, as applied to the *present* generation, the finding of purpose was clearly erroneous. When the 1954 trusts were created, Beeman had already been President of Finch-Pruyn for six years and had shown his ability to run the company. We find no evidence, however, to support the conclusion that the

[8]This does not imply that there could never be a conflict between the interests of the Management Trust and the 1954 Trust as an independent matter. For example, if Lyman Beeman were to exercise his discretionary power to terminate the 1954 Trusts, a question might be raised whether this had been done, not in the interests of the 1954 trust beneficiaries, but to split the 1954 Trust's control, leaving the Management Trust as the sole source of the Beemans' majority control.

settlors intended the Hoopes branch to control exclusively in succeeding generations, when Beeman's descendants might not be as capable of running the business, but could nevertheless refuse to yield to a competent *non-family* president.

[4] The court concluded that negotiations had been conducted "with no attempt at concealment." We see no evidence to support the subsidiary finding that there were "numerous prior general discussions within the company" (if this was meant to include *directors* of the company who were not also associated with Beeman as corporate officers), but the experienced and able trial judge was in a position to weigh credibility. Though the circumstantial evidence is equivocal, we accept his assessment of credibility and let stand his finding that there was no attempt to conceal.

On the other hand, we think the finding of implied consent to the purchase by Mrs. Hyde and Mrs. Cunningham was clearly erroneous. Though the Judge did not find that there was *express* consent, he did find consent implied from the circumstances. In Judge Foley's view, this independently exonerated the Beemans from liability. *Cf. Central Hanover Bank & Trust Co. v. Russell,* 290 N.Y. 593, 48 N.E.2d 704 (1943). The Judge based his holding on the following: First, he found a pattern of intra-family discussions of Finch-Pruyn Co. affairs. Second, he found a pattern of courteous and responsive treatment by Lyman Beeman of family inquiries concerning trust matters. Third, he inferred a vote of continued confidence in Lyman Beeman from the settlors' non-exercise of their testamentary powers of appointment under the 1954 Trust. Finally, the court relied on a letter from Lyman Beeman to Mary Hyde Whitney, in which the extent of Mrs. Beeman's personal holdings, including the Foulds stock, is disclosed.

[5] This evidence is insufficient to support the inference of permission for the purchase that the District Court drew. Consent to self-dealing requires a more specific showing. It must be "clearly proved" and "made with a full knowledge of all the material particulars and circumstances," including the full extent of the *cestui's* legal rights. *Adair v. Brimmer,* 74 N.Y. 539, 554 (1878); accord *Matter of Ryan,* 291 N.Y. 376, 417, 52 N.E.2d 909 (1943). Accepting as proper the trial court's exclusion of evidence rendered incompetent by New York's Dead Man's Statute, N.Y.Civ.Prac.Law §4519 (McKinney 1963 & Supp. 1978) (CPLR), we hold that the record falls short of clear proof. Neither general confidence in Lyman Beeman nor his general courtesy spell consent to personal advantage in a conflict of interest with the beneficiaries of the trust. Moreover, the letter, which we discuss in more detail when we reach the statute of limitations, though it raises other implications, is not persuasive evidence of actual consent.[9]

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[9]Appellees also rely upon a visit by Franklin Renz to Elmer White on September 15, 1969 to show ratification by silence. Mr. Renz's visit was prompted by the urging of his mother-in-law, Mrs. Mary Hyde Whitney, who had succeeded to an interest in her own right in the 1954 Cunningham trust, to find out the status of various Charlotte P. Hyde trusts. Mr. White furnished handwritten summaries of the trust's positions. The court found that Mr. Renz was told that Mrs. Beeman owned 2270 voting shares outright, but the court also found that "[d]uring these meetings, there was no specific disclosure of Mrs. Beeman's *purchase* of the Foulds stock" (emphasis added). Franklin Renz testified that he had no knowledge of the purchase of the Foulds stock by Mrs. Beeman until his attorneys gave him that information by letter of November 2, 1972, though his attorney, as early as September 27, 1972, mentions the purchase in a letter in which he also states that he had been going over various matters with Mary and Franklin Renz.

[6, 7] Under the higher standard of undivided loyalty, the law "stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case." *Munson v. Syracuse, Geneva & Corning R.R.*, 103 N.Y. 58, 74, 8 N.E. 355, 358 (1886); *Wendt v. Fischer*, 243 N.Y. 439, 444, 154 N.E. 458, 464, 164 N.E. 545 (1928). The main support for the District Court's application of a good faith standard instead of an "undivided loyalty" standard comes, however, from its conclusion that the trustees were permitted to engage in self-interested transactions by virtue of the *exculpatory* provisions in the 1954 trust agreement. It is true that even a trustee's duty of "utmost loyalty" can be reduced by means of language in the trust instrument permitting certain transactions involving self-interest, *O'Hayer v. de St. Aubin*, 30 A.D.2d 419, 424, 293 N.Y.S.2d 147 (1968); *Matter of Balfe*, 245 App. Div. 22, 280 N.Y.S. 128 (1935), or by express consent of the settlor, *Central Hanover Bank & Trust Co. v. Russell, supra*, 290 N.Y. at 594, 48 N.E.2d 704; *Matter of Dow*, 32 Misc.2d 415, 156 N.Y.S.2d 804 (1955), *modified on other grounds*, 3 A.D.2d 968, 162 N.Y.S.2d 196 (1957), *affirmed*, 5 N.Y.2d 739, 177 N.Y.S.2d 718, 152 N.E.2d 673 (1958). Such an exculpatory clause or agreement does reduce the standard of duty to one of good faith and permits a court to weigh the merits of the transaction. *Matter of Balfe, supra.*

[8-10] We do not agree, however, that the exculpatory clauses cited below justified a lowering of the standard of the trustee's obligation. Only the most explicit language can protect a fiduciary from liability in a conflict of interest with his *cestuis*. *See, e. g., Matter of Hubbell*, 302 N.Y. 246, 255, 97 N.E.2d 888 (1951). Courts may not

read exculpatory language broadly, lest they unwittingly permit erosion of the fiduciary duty itself. *See Wendt v. Fischer, supra*, 243 N.Y. at 443-44, 154 N.E.2d 303.

The clauses in the agreement relied on below concern matters relating to management of the trust corpus. They give the trustees broad discretion to exercise powers and rights incident to ownership of the trust property, and we assume (though we need not decide) that they establish a good faith business judgment in the handling of trust investments. Nowhere in the agreement, however, do we find a provision granting to the trustees the right to prefer their own interests to those of the trust, or to appropriate for their own account trust opportunities. We think, rather, that the trustees were given such broad powers in managing the trust *because* there was implicit faith in their undivided loyalty. *See Matter of Durston*, 297 N.Y. 64, 71-72, 74 N.E.2d 310 (1947). That conclusion is accepted by the willingness of the settlors to accept Lyman Beeman as a "disinterested" trustee who would protect *all* the beneficiaries without favoring his own wife.

The present case differs markedly from *O'Hayer v. de-St. Aubin, supra.* There the trust instrument expressly stated the settlor's intent that he and his son, as trustees, should be free to profit from their trusteeships. *Id.*, 30 A.D.2d at 423-24, 293 N.Y.S.2d 147. In addition, the trust instrument expressly gave the trustees power to engage in self-dealing in the stock of the corporation whose shares comprised the corpus of the trust. *Id.* at 424, 293 N.Y.S.2d 147. *Matter of Balfe, supra,* is also different. Under the will "the trustee was authorized to act in respect of the securities in the estate without regard to whether or not the trustee had a personal interest in these same kinds of securities or the companies to which they related." *Id.*, 245 A.D. at 24, 280 N.Y.S. at 130.

[11] The exculpatory langauge involved in this case more closely resembles provisions in *Matter of Durston, supra,* which conferred power to act "'with all the authority, and powers in connection with the same, I would possess, if living.'" The Court of Appeals held that such power is "to be exercised, however, in the manner and subject to the obligations and duties of trustees. If the testator intended that all these things could be done without regard to the fundamental rule of absolute loyalty and fidelity prohibiting any purchase or retention of securities involving a divided loyalty, the authority should have been stated." *Id.,* 297 N.Y. at 72, 74 N.E.2d at 313. We discern no express exculpation in the 1954 Trust permitting competition with the trust in the purchase of voting stock that is the core of control and comprises the *corpus* of the trust. We turn, therefore, to consider the position of the trustees without benefit of an effective exculpatory provision.

II

In the absence of an express exculpatory clause and a lack of proof of clear consent, the central question is the obligation, under New York law, of a trustee of a family trust which controls a family corporation through ownership of a majority of the voting stock, where more than a single branch has a beneficial interest.

[12-15] Absent exculpation or clear consent, it is the existence of the conflict alone that establishes the obligation. *City Bank Farmers Trust Co. v. Cannon,* 291 N.Y. 125, 132, 51 N.E.2d 674 (1943); *Matter of Van Deusen,* 37 A.D.2d 131, 133, 322 N.Y.S.2d 951 (1971); *Matter of DePlanche,* 65 Misc.2d 501, 502, 318 N.Y.S.2d 194 (1971). Conflict can arise when a trustee becomes a competitor with the trust for a business opportunity. *Meinhard v.*

Salmon, supra; Wootten v. Wootten, 151 F.2d 147, 150 (10th Cir. 1945), 159 F.2d 567 (10th Cir. 1947), *cert. denied,* 331 U.S. 835, 67 S.Ct. 1516, 91 L.Ed. 1848 (1947); 2 *Scott on Trusts* §170.21 (3d ed. 1967); *Restatement (Second) of Trusts* §170.[10] Favoring one beneficiary over others may also be a source of conflict. *Schwartz v. Marien,* 37 N.Y.2d 487, 491, 373 N.Y.S.2d 122, 335 N.E. 2d 334 (1975).

[16] We need not consider whether purchases in smaller lots of Finch-Pruyn stock would have placed the defendants in competition with the trust. The complaint against the trustees with respect to the purchase of the Voting Preferred Stock is limited to the shares purchased on or about the 8th day of August, 1962 (erroneously described as 2277 rather than 2000 shares proved at trial). (Complaint ¶23). And the only constructive trust prayed for was to be imposed upon "the 2,277 shares." In the six years preceding the filing of the complaint, Mary Beeman acquired 150 shares of Class A Stock in 1972 and Lyman Beeman acquired 63 shares in 1972 and 25 shares in 1975. We will remand to the District Court to determine whether any of these shares was purchased from the Treasury of Finch-Pruyn out of either the 8,000 initially authorized shares or the 2000 additional shares authorized in 1967. If any of the shares were so acquired and without an offer to participate to the other beneficiaries of the 1954 trust, the District Court may find a breach of trust under *Schwartz v. Marien,* 37 N.Y.2d 487, 373 N.Y.S.2d 122, 335 N.E.2d 334 (1975), and if it so finds, may fashion an appropriate remedy.

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[10] "A trustee violates his duty to the beneficiary if he enters into a substantial competition with the interest of the beneficiary." *Id.,* comment p.

[17, 18] As far as this appeal is concerned, we deal with only a single large purchase which could, as indeed it did, give unchallengeable control of Finch-Pruyn to the Hoopes branch for generations to come. The absolute control of the Finch-Pruyn corporation was an asset of the trust. It is to the preservation of the joint control created by the settlors that the trustee had a fiduciary obligation. By putting the shares for control into a single basket, the settlors pledged the trustee not to disarrange the balance of control that had been created. His fiduciary obligation was enhanced because he was a member of the family whose welfare he had taken upon himself to preserve. To be sure, he had an obvious opportunity for a different conflict of interest in his position as president of the corporation and as trustee of a trust which controlled the corporate entity. But that potential conflict was known to the settlors and they were content to let Beeman serve in that dual capacity despite the remote possibility of conflict between his duties as president and as trustee. In any event, we have affirmed the finding that the apportionment of price between the corporation's purchase of the common stock and Mrs. Beeman's purchase of the preferred stock was both fair and based upon appraisal. No breach of duty can thus be inferred from his dual role. *See Matter of Kellogg,* 35 Misc.2d 541, 230 N.Y.S.2d 836 (1962); *Matter of Dow, supra,* 32 Misc.2d at 419, 156 N.Y.S.2d 804.

[19-21] It is true also that the trustee never dealt with the shares which were in the corpus of the trust. In that sense Mr. Beeman may have been an exemplary trustee. But the absence of self-dealing does not measure the limit of the fiduciary obligation. The trust possessed an intangible asset which was to be free of competition from its fiduciary. An opportunity for purchase that

comes to him while in a fiduciary capacity compels the trustee to give a right of first refusal to his trust estate if the opportunity fits the purpose of the trust. *Wootten v. Wootten, supra,* 151 F.2d at 150. *See Restatement (Second) of Trusts* §170, comment k. When the trust is settled by two branches of a family, who jointly own control of a family company, the chancellor will insist that a trustee with ties to one branch should not disfavor the other. To upset the balance of control for selfish gain is to commit a breach of the high fiduciary duty of undivided loyalty. *See Schwartz v. Marien, supra,* 37 N.Y. 2d at 491-492, 373 N.Y.S.2d 122, 335 N.E.2d 334.

Under the testamentary trust Mary Whitney Renz would have become a direct distributee free of trust restraint. At the instance of the settlors including her mother, the dissolution and recreation of the 1954 *inter vivos* trusts reduced Mrs. Whitney to the position of a remainderman and ultimate life-tenant. As we have noted, the purpose was to keep the Beemans in charge. There is no claim of fraud or overreaching in the creation of the 1954 trust itself.

It thus appears that the plaintiff herself, who succeeded to a mere life tenancy, could never gain outright control during her lifetime of the shares of her grandmother, Mrs. Hyde, unless either Lyman Beeman terminated the 1954 Trust, or Mrs. Hyde exercised her power of appointment in favor of the plaintiff.

It could hardly be clearer that Mrs. Hyde, by failing to exercise her power of appointment before her death in 1963, did express her wish that appellant should never have voting power over the trust shares. When an opportunity came to buy Mrs. Foulds' 2000 shares from the

Metropolitan Museum of Art, such a purchase by the trust, even if it had been financially able to make it, would not have enhanced appellant's position with respect to control, but would only have affected her dividends as a life-tenant of the Hyde and Cunningham trusts. To buy the 2000 shares, either the Hyde or Cunningham trust would have had to borrow on its only asset, the preferred shares in the trust. Such borrowing would hardly have been supported by the aged life-tenants, whose dividends might have been cut as a result.

Thus, while Mary Beeman was theoretically in competition with the Hyde trust when she bought the shares from the Metropolitan, she was not in practical competition with appellant herself, for appellant was locked in.

This does not take into account, however, the position of the children of Mary Whitney Renz and Louis Whitney and succeeding generations. Upon the death of appellant, her children will succeed to an outright interest in Mary Renz's shares in the Hyde and Cunningham trusts. When that happens, they will still not control the corporation. The children of Mary Renz and Louis Whitney together will own 1777⅔ shares derived from the Hyde trust and 592 8/9 shares from the Cunningham trust, for a total of 2370 5/9 shares. The Hoopes side without the Foulds purchase would have had 999 5/6 shares directly from Mary Beeman and Samuel P. Hoopes, Jr., plus 777 5/6 shares from the Mary Beeman 1954 Trust, plus 1185 7/9 shares from the Cunningham trust, for a total of 2963 4/9 shares. Thus, *together* the two families would command a two-thirds majority of the outstanding shares. Alone, although the Hoopes family would have had a slight edge, neither family would have had a majority of the shares.

Such a stalemate could have resulted eventually in a new trust arrangement, with each side participating in the selection of new trustees, or in the creation of a voting trust. It is this eventuality, which the 1954 Trust may be said to contemplate, that the Beemans' stock purchase eliminated. By purchase of the 2000 Foulds shares, Lyman and Mary Beeman succeeded in taking for themselves and their family absolute control of the voting stock forever. When the Management Trust terminates in 1990, the Hoopes family will continue to control to the exclusion of the Hydes by outright ownership of a majority of the voting shares. They may be able, moreover, to demand a premium for themselves if they sell their shares as a "control" block.

[22] When the Foulds stock became available, it was the duty of Beeman, as trustee, to notify the life-tenants, who because of their powers of appointment could have given binding consent to the purchase, *see, e. g., Central Hanover Bank & Trust Co. v. Russell, supra,* 290 N. Y. at 594, 48 N.E.2d 704; *Wootten v. Wootten, supra,* 151 F.2d at 150; *Parker v. Rogerson,* 33 A.D.2d 284, 289, 307 N.Y.S. 2d 986, *appeal dismissed,* 26 N.Y.2d 964, 311 N.Y.S.2d 7, 259 N.E.2d 479 (1970); and to offer the stock to the Finch-Pruyn Company as a means of preserving the balance of control between the Hyde and Hoopes families. If the company had been willing to buy the preferred stock at what the District Court has found to be a fair price, the company purchase would have left the balance of control unaffected. There was no such offer by the trustee to Finch-Pruyn, however, and the District Court inferentially so found. If the corporation was unwilling to make the purchase, the opportunity should have been offered to the trust, or to the beneficiaries in proportion to their interest, *Wootten v. Wootten, supra,* 151 F.2d at 150. At the least, the trustees should have petitioned

for court approval for Mrs. Beeman to make the purchase. *See Matter of Scarborough Properties Corp.*, 25 N.Y.2d 553, 307 N.Y.S.2d 641, 255 N.E.2d 761 (1969).[11]

We hold then, that the fiduciary duty of the Beemans was higher than that applied by the District Court. It was an obligation which was not to be measured by fairness or merit but by a standard of strict prohibition against the acts of a trustee which could disserve the future interests of some of his beneficiaries. It was, at least, the standard that would have been imposed on an independent trustee who was permitted to favor neither side.

[23, 24] The rule was well-stated in *Matter of Shehan*, 285 A. D. 785, 791, 141 N.Y.S.2d 439, 444 (1955):

> The duty of a trustee is easily defined because it is absolute. "The rule is inflexible that a trustee shall not place himself in a position where his interest is or may be in conflict with his duty". (*Matter of Lewisohn*, 294 N.Y. 596, 608, 63 N.E.2d 589.)

[11]We cannot say that disinterested directors would necessarily have purchased the Foulds preferred stock. That would have depended on their judgment of whether the saving of dividend payments on 2000 preferred shares was worth the purchase price to be paid. But they should have been given the opportunity by the trustee, if only in the hope that the family balance of power entrusted to the trustee's care might be thus preserved.

The steps required by the trustee, if taken, would not have been purely formal gestures. By the time the actual purchase was made, Mrs. Whitney, plaintiff's mother, was already a vested beneficiary by devolution from Mrs. Cunningham, who had died a month earlier. Mrs. Whitney had expressed her concern for the welfare of her children and might well have spoken up, if given notice, either by purchasing an aliquot share or by challenging the right of Mary Beeman to buy the stock without a court proceeding.

We hold that there is no exculpatory clause in this trust specific enough to dilute the rule. Nor do we find evidence to support a finding that the trust beneficiaries knew of the conflict and clearly gave their consent to Mrs. Beeman's purchase of the Foulds shares.[12] The trustees committed a breach of trust when Mary Beeman purchased the Foulds shares in 1962. On the other hand, we cannot find clearly erroneous the finding below that there was no fraudulent intent.

III

[25] The District Court determined as an alternative ground for its decision that the New York statute of limitations was a bar to recovery in this action which was begun on September 24, 1974. The District Court noted that if the cause of action accrued on August 1962, the date of the purchase of the Foulds shares, the statute of limitations for equitable causes of action would remain the ten-year statute, C.P.A. §53, that was applicable before September 1, 1963, the effective date of the new CPLR. *Beresovski v. Warszawski*, 28 N.Y.2d 419, 422, 322 N.Y.S.2d 673, 271 N.E.2d 520 (1971). The court below held that even under the ten year statute the cause had been barred by limitations in August 1972, before the

[12]Here we note the dilemma created by the Dead Man's Statute. Lyman Beeman did offer to prove that, in conversations with the deceased Mrs. Cunningham and Mrs. Hyde, he obtained their permission for his wife to purchase the 2000 shares. Judge Foley properly rejected this testimony, but in such cases a lingering doubt often remains whether the statute might not, in its application, actually subvert the objective truth.

complaint was filed in September 1974. Since we hold that the breach of trust occurred in August 1962, the decision below must be affirmed, unless the breach itself amounted to fraud, or there was a fraudulent misrepresentation thereafter which estopped the trustee from pleading the bar of the statute.

The court found insufficient evidence to support a finding that the appellees had committed fraud. It found it unnecessary, therefore, to decide whether the complaint had been filed within two years after appellants "discovered the fraud, or could with reasonable diligence have discovered it."[13]

The court also found that the defendants were not subject to an equitable estoppel of their plea of the statute of limitations as a bar.

For reasons somewhat different from those of the District Court, we affirm Judge Foley's determination that the action is barred by the statute of limitations. We agree that the breach of trust was subject to the ten-year statute and that it ran in August 1972. We also affirm Judge Foley's ruling that there was no basis for an equitable estoppel to toll the statute.

[26] When dealing with the statute of limitations, there is a line of cleavage not always clearly discernible between conduct which is a breach of fiduciary duty and conduct which is intentionally fraudulent. When there

[13]CPLR §213(8) applies to "an action based upon fraud; the time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it." The two-year time period dating from discovery is found in CPLR §203(f).

is a breach of fiduciary duty *without fraudulent intent*, the action in equity is governed by CPLR §§ 203(1) and 218(b) (here C.P.A. §53), and the limitations period expires at the end of six years (here ten years) from the last act of breach—in this case in August 1972. *Erbe v. Lincoln Rochester Trust Co.*, 2 A.D.2d 242, 154 N.Y.S. 2d 179 (1956), *rev'd on other grounds*, 3 N.Y.2d 321, 165 N.Y.S.2d 107, 144 N.E.2d 78 (1957).

[27, 28] It does not follow from the fact that the Beemans committed a breach of fiduciary duty that they were also guilty of fraud. To make a case of fraud, it would have been necessary to show that the Beemans intentionally sought to defraud the trust beneficiaries. *See Nasaba Corp. v. Harfred Realty Corp.*, 287 N.Y. 290, 294-95, 39 N.E.2d 243 (1942); *Finn v. Empire Trust Co.*, 121 F.Supp. 309, 315 (S.D.N.Y. 1950). We cannot find, any more than Judge Foley did, that fraud was proved at trial by a preponderance of the evidence. Moreover, the fiduciary obligation with respect to the Foulds stock which we have stated was not obvious. Self-dealing with the trust *res*, a common form of deviation from the rule of undivided loyalty, was not involved. Authority that a trustee in this situation was required to consider the Foulds purchase as antagonistic to the trust interests was sparse. The trustee had some reason, as Judge Foley noted, to purchase the shares from the Metropolitan Museum in a preemptive move to prevent strangers, whose interests might be antagonistic to both the Whitney and Hoopes families, from getting 25% of the voting stock. And Lyman Beeman may well have thought that since control of the company was already in his hands as a trustee, the purchase of the additional shares would not upset the existing balance of power. He may not have consciously considered that this purchase would prevent future generations of the Hyde branch from participating in control of Finch-Pruyn, and that there was,

therefore, a conflict of interest, calling into play the strict test of undivided loyalty. His breach of fiduciary duty, in the light of the considerations mentioned, was not, in the absence of stronger circumstantial evidence, equivalent to fraud. Hence, we must affirm the finding that fraud was not proved. Fed.R.Civ.Proc. 52(a) *United States v. National Association of Real Estate Boards,* 339 U.S. 485, 495-96, 70 S.Ct. 711, 94 L.Ed. 1007 (1950); *Nello L. Teer Co. v. Hollywood Golf Estates, Inc.,* 324 F.2d 669, 670 (5th Cir. 1963), *cert. denied,* 377 U.S. 909, 84 S.Ct. 1169, 12 L.Ed.2d 178 (1964); *Tobacco & Allied Stocks v. Transamerica Corp.,* 244 F.2d 902, 904 (3d Cir. 1957); *Beckton Dickinson & Co. v. R. P. Sherer Corp.,* 211 F.2d 835, 838 (6th Cir. 1954).[14]

[29-36] The question then is whether, in the absence of fraudulent conduct by the trustee when he committed the breach of duty, he can be estopped from pleading the statute of limitations because of his conduct after the breach occurred.

Equitable estoppel is not available to toll the statute in all cases of fiduciary breach, even if there was a breach of an initial duty to disclose. *See Scheuer v. Scheuer,* 308 N.Y. 447, 126 N.E.2d 555 (1955). It is invoked, rather, when the defendant's affirmative misconduct, *after* his initial breach of duty, "produced the long delay between the accrual of the cause of action and the institution of the legal proceeding." *General Stencils, Inc. v.*

[14]Though we do not find fraudulent conduct on the part of the defendants, we would hold, in any event, that "reasonable diligence" should have discovered the fraud more than two years before the complaint was filed. CPLR §203(f); *see Rutland House Assoc. v. Danoff,* 37 A. D. 2d 828, 325 N. Y. S. 2d 273 (1971); *Hoff Research & Dev. Labs, Inc. v. Philippine Nat'l Bank,* 426 F. 2d 1023, 1025, 27 (2d Cir. 1970).

Chiappa, 18 N.Y.2d 125, 128, 272 N.Y.S.2d 337, 340, 219 N.E.2d 169, 171 (1966). A common illustration of this kind of equitable estoppel arises where the plaintiff is about to institute suit and is lulled into security by promises which the defendant does not intend to fulfill but upon which the plaintiff relies, only to find that the statute has run. *See, e. g., Robinson v. City of New York,* 24 A.D.2d 260, 263, 265 N.Y.S.2d 566 (1965) (agreement to stay suit). Equitable estoppel may arise when the defendant misrepresents to the plaintiff the time within which he may begin suit. *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959). Equitable estoppel may also arise when affirmative fraudulent statements are made which conceal from the plaintiff facts essential to make out the cause of action. *See, e. g., Simcuski v. Saeli,* 44 N.Y. 2d 442, 448-49, 406 N.Y.S.2d 259, 377 N.E.2d 713 (1978); *General Stencils, Inc. v. Chiappa, supra* (cover-up of criminal acts); *Erbe v. Lincoln Rochester Trust Co.,* 13 A.D.2d 211, 214 N.Y.S.2d 849 (1961), *appeal dismissed,* 11 N.Y.2d 754, 226 N.Y.S.2d 692, 181 N.E.2d 629 (1962) (false statement by fiduciary that it had legal right to purchase part of trust *res*); *Dodds v. McColgan,* 229 A.D. 273, 241 N.Y.S. 584 (1930) (elaborate hoax involving false disavowal of property ownership, misrepresentation of status as executrix of defunct estate, and execution of sham settlement).[15]

[15]Many cases of this kind come up on motions to dismiss the complaint, and some of the language of the opinions simply reflects the strong feeling of appellate courts that the plaintiff should prevail against summary dismissal, if on any set of facts he might prevail at trial. E. g., *Dupuis v. Van Natten,* 61 A. D. 2d 293, 402 N. Y. S. 2d 242 (1978); *Quadrozzi Concrete Corp. v. Mastroianni,* 56 A. D. 2d 353, 392 N. Y. S. 2d 687, appeal dismissed, 42 N. Y. 2d 824 (1977); *Robinson v. City of New York, supra; Erbe v. Lincoln Rochester Trust Co., supra.*

On this appeal the argument for an equitable estoppel against the defendants is based principally on a letter of September 10, 1963 from Lyman Beeman to Mrs. Whitney. In that letter the extent of Mrs. Beeman's stock holdings was accurately disclosed, but there was no allusion to the source of her stock ownership. Mr. Beeman wrote to Mary Hyde Whitney (plaintiff's mother), who had inquired after the death of her mother, Charlotte Hyde, about the voting control of Finch-Pruyn, as follows:

> [T]he control was in the Preferred stock and concentrates mainly in the Trust set up originally under the will of Samuel Pruyn, which has been changed to some extent but still controls over 50% of the stock. Polly [Mary Beeman] and Elmer White are trustees of this Trust *and in addition Polly owns outright about 30%*. This control has been in the hands of Maurice Hoopes, your father and Polly pretty much through the 50 years of its existence (italics supplied).

The letter ended: *"There may be other things you want to know and I will be happy to try to answer any questions you have to ask."*

The letter might, indeed, have created the impression on strangers that Mary Beeman had held 30% of the voting stock for a long time, and that all her shares had been obtained by inheritance. But it is by no means clear that the intent was to conceal, particularly in the light of Beeman's invitation for further inquiry. Judge Foley found that there was no intentional concealment of the purchase. As an appellate court, we cannot say that the finding of Judge Foley, a judge of great experience in assessing credibility that there was no intent to conceal was clearly erroneous. Fed. R.Civ.Proc. 52(a).

Though the lack of affirmative acts of concealment amounting to fraud is enough to defeat the claim that the statute of limitations was tolled by an equitable estoppel, we must note also that enough was stated to require the appellants, in the circumstances, to pursue further inquiry with diligence. The letter on its face reveals enough to have elicited a further inquiry from Mrs. Whitney of how Mrs. Beeman managed to get 30% of the voting stock "outright."

Appellants and their predecessors had access to the will of Samuel Pruyn, knew the terms of the trust created by that will, and had or could easily get the instrument creating the 1954 trusts. They also knew about the shares which devolved upon the death of Mrs. Cunningham in July 1962. From these documents it was simple enough to calculate Mrs. Beeman's total holding derived by inheritance. Comparison of that figure with the figure of 30% outside the 1954 trust in the 1963 letter would have indicated that Mary must have acquired a considerable number of shares by methods other than inheritance. It was reasonable to assume that persons who, as Judge Foley found, had initiated inquiry into the voting control of the company, and who, as Mrs. Whitney's letters to her mother indicate, had expressed suspicion of the motives of Mrs. Beeman, would make such a simple computation from materials available or easily obtained. Once this basic fact was known, an inquiry, as was in fact later made by the Renz lawyer, would have elicited the facts concerning the Foulds purchase. There is no indication that a request to see the shareholders' list would have been refused. *See* N.Y. Business Corp. Law §624 (McKinney 1963 & Supp. 1977). The stock ledger showed the transfer to Mary Beeman of 2000 shares on August 13, 1962.

When plaintiffs possess "timely knowledge" sufficient to place them "under a duty to make inquiry and ascertain for themselves all the relevant facts," courts should "not view with favor a claim of estoppel grounded in fraud." *Augstein v. Levey,* 3 A.D.2d 595, 598, 162 N.Y.S.2d 269, 273 (1957), *affirmed,* 4 N.Y.2d 791, 173 N.Y.S.2d 27, 149 N.E.2d 528 (1958). All that is needed to commence the running of the statute is "knowledge of facts sufficient 'to suggest to a person of ordinary intelligence the probability that he has been defrauded.'" *Sielcken-Schwarz v. American Factors, Ltd.,* 265 N.Y. 239, 246, 192 N.E. 307, 310 (1934) (quoting *Higgins v. Crouse,* 147 N.Y. 411, 416, 42 N.E. 6, 7 (1895)). This court has consistently adhered to that view when applying New York law. *See, e.g., Klein v. Bower,* 421 F.2d 338, 343-44 (2d Cir. 1970); *Talmadge v. United States Shipping Board,* 54 F.2d 240, 243 (2d Cir. 1931), *on remand,* 66 F.2d 773 (1933), *cert. denied,* 291 U.S. 669, 54 S.Ct. 454, 78 L.Ed. 1059 (1934). We think that the test for timely knowledge under the doctrine of equitable estoppel is similar to that set forth with regard to fraud in CPLR §213(8)—"could with reasonable diligence have discovered it."

We must hold, therefore, that since appellants were told on September 10, 1963 the extent of Mary Beeman's holding and could have easily discovered that she could not own so many shares by inheritance alone, they were in a position by simple inquiry to discover the details of the Foulds purchase. In these circumstances, the statute of limitations was not tolled.

Appellants also suggest that there was enough ambiguity in the conversations held in 1969 between Franklin Renz and Elmer White to make a case of fraudulent concealment. *See* footnote 9. Renz, Mrs. Whitney's representative, inquired generally concerning the status of

family stock holdings. He was told the true extent of Mary Beeman's ownership, but he did not ask how she acquired her shares. White, treasurer of Finch-Pruyn, did not volunteer that it was in part derived from the Foulds stock purchase. Renz failed to make further inquiry. That he failed to ask the proper questions and succeeded only in discovering what had already been discovered in the 1963 letter was not enough to bar the statute of limitations defense.

We conclude that Judge Foley was right in his determination that the statute of limitations barred the action. We accordingly affirm his dismissal of the complaint on that ground, costs to appellee.

With respect to allegations against the other corporate directors, the statute of limitations has surely run. The plaintiffs have withdrawn their derivative causes of action, and the directors have not been shown to have engaged in any kind of concealment at the time of the purchase by Mrs. Beeman, or between 1962 and 1972 when the statute for acts committed in breach of trust by the Beemans had run.

The participation of some of the directors in the Management Trust set up in 1969 did not create a new cause of action, and Judge Foley so found. In our view, the creation of the Management Trust itself involved no breach of duty. The purchase of the 2000 Foulds shares which went into the Management Trust was the heart of the fiduciary problem, and the purchase itself is barred as a claim for relief.

The dismissal of the complaint is affirmed except with respect to the putative transactions held to be not barred by the statute of limitations. Accordingly, the present judgment of dismissal is vacated for further proceedings in accordance with the opinion.

Moore, Circuit Judge (concurring):

I concur in Judge Gurfein's opinion that the statute of limitations bars this action. In addition to the reasons (and facts in support thereof), so convincing of notice, I would merely note that from the moment of the press announcement of Mrs. Foulds' death in 1958 and her bequest of F-P stock to the Met, the question of its ultimate disposition must have been uppermost in the minds of every member of the Pruyn lineage. Therefore, although the letter of September 10, 1963 gave a direct statement of Mary Beeman's holdings, the question must have been considered and undoubtedly discussed in family circles, namely: I wonder whatever happened to the Foulds' stock?

I differ with Judge Gurfein's opinion as to the fiduciary-trustee issue on his application of the law to the facts or possibly better the facts to the law. I agree that the highest standards of trust loyalty should apply but I am equally mindful of Justice (then Chief Judge) Cardozo's precept in *Meinhard v. Salmon,* 249 N.Y. 458 at 466, 164 N.E. 545, at 547 (1928): "Little profit will come from a dissection of the precedents". Decision in each case must rest on its own facts.

I do not place any reliance upon the exculpatory clause. On the other hand I see no justifiable reason for Lyman Beeman to have used F-P assets to purchase a preferred stock for the company when it had no business reason for so doing. To me the reasons for not buying the stock for the Trust are equally clear. It had no assets with which to make the purchase. To have borrowed the money for the purchase, pledging F-P stock, might well have been a breach of trust had the beneficiaries chosen to complain that their interests were adversely affected thereby.

In short, Judge Foley heard all witnesses called by plaintiffs, found that there was no proof of corporate mismanagement, and no fraudulent concealment of Mrs. Beeman's stock purchase. To the contrary he found the fair inferences to be otherwise. Upon the law and the facts, I would affirm Judge Foley's decision in its entirety with the comment that some significance adverse to plaintiffs attaches in my opinion to the making of the serious type of charges set forth in causes of action Fourth, Eighth and Ninth as well as Sixth and Seventh (derivative) and then withdrawing them without tendering any proof thereon.

Decision of Second Circuit Court of Appeals Refusing to Rehear Matter *in banc*.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of January, one thousand nine hundred and seventy-nine.

MARY WHITNEY RENZ, etc. *et al.*,

Plaintiffs-Appellants,

v.

LYMAN A. BEEMAN, and MARY H. BEEMAN, etc. *et. al.*,

Defendants-Appellees.

78-7007

A petition for rehearing containing a suggestion that the action be reheard *in banc* having been filed herein by counsel for appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge

Decision of Second Circuit Court of Appeals Denying Rehearing.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of January, one thousand nine hundred and seventy-nine.

Present:

Hon. Leonard P. Moore,
Hon. William H. Mulligan,
Hon. Murray I. Gurfein,
Circuit Judges.

MARY WHITNEY RENZ, as a beneficiary under the Charlotte P. Hyde Trust, etc. *et. al.*,

Plaintiffs-Appellants,

v.

LYMAN A. BEEMAN and MARY H. BEEMAN individually and as Trustees of the Charlotte P. Hyde Trust etc. *et. al.*,

Defendants-Appellees.

78-7007

A petition for a rehearing having been filed herein by counsel for the appellants

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

Decision of U. S. District Court for the Northern District of New York.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

MARY WHITNEY RENZ, as a beneficiary under the Charlotte P. Hyde Trust and the Nell P. Cunningham Trust and the Charlotte P. Hyde Testamentary Trust; FRANKLIN W. RENZ, as Executor under the Last Will and Testament of Mary P. Whitney who was a beneficiary under the Charlotte P. Hyde Trust and the Nell P. Cunningham Trust and the Charlotte P. Hyde Testamentary Trust; FRANKLIN W. RENZ, as Executor under the Last Will and Testament of Mary P. Whitney, and MARY WHITNEY RENZ, derivatively and in the right and for the benefit of Finch, Pruyn & Company, Inc.,

Petitioners,

against

LYMAN A. BEEMAN and MARY H. BEEMAN, individually and as Trustees of the Charlotte P. Hyde Trust and the Nell P. Cunningham Trust, both created the 14th day of June, 1954; LYMAN A. BEEMAN, SAMUEL P. HOOPES, THOMAS E. MEATH, LYMAN A. BEEMAN, Jr. and ELMER S. WHITE, as Trustee of a Trust established under Agreements dated January 16, 1969, with Mary H. Beeman and Samuel P. Hoopes; LYMAN A. BEEMAN, MARY H. BEEMAN and SAMUEL P. HOOPES as Trustees under the Charlotte P. Hyde Testamentary Trust; MARY H. BEEMAN and SAMUEL P. HOOPES as Beneficiaries under the Nell P. Cunningham Trust; LYMAN A. BEEMAN, Individually and as Director, Chairman of the Board and Chief Executive of Finch,

Pruyn & Company, Inc.; THOMAS E. MEATH, individually and as Director and President of Finch, Pruyn & Company, Inc.; LYMAN A. BEEMAN, Jr., individually and as Director and Senior Vice-President of Finch, Pruyn & Company, Inc.; SAMUEL P. HOOPES, individually and as Director and Vice-President of Finch, Pruyn & Company, Inc.; MARY H. BEEMAN and ELMER S. WHITE, individually and as Directors of Finch, Pruyn & Company, Inc.; and FINCH, PRUYN & COMPANY, Inc.,

Respondents.

74-CV-400

Memorandum-Decision and Order.

JAMES T. FOLEY, D.J.:

Plaintiffs commenced this diversity action on September 24, 1974. In a previous memorandum-decision, *Renz v. Beeman*, 74-CV-400 (N.D.N.Y., filed Aug. 13, 1975), I denied plaintiffs' motion for interim injunctive relief, premising that decision upon the well-settled standards established by the Court of Appeals, Second Circuit. Filing no appeal from such decision, plaintiffs thereafter filed a note of issue for court trial upon the merits; and, accordingly, a trial was held before this Court on May 3-6, 1977. The substantial briefs by the attorneys for the several parties, including exhibits, proposed findings of fact and conclusions of law were duly submitted after the completion of the trial transcript.

Plaintiffs, Mary Whitney Renz and her husband, Franklin Renz, residents of the State of Connecticut, have initiated this action in their various capacities as trust beneficiary, executor and stockholder. The defendants are the several trustees of numerous individual trusts, as hereinafter noted, the "closely held" corporation, Finch,

Pruyn & Company, Inc. (Finch-Pruyn), and its corporate officers and directors. The principal place of business and the residence of the individual defendants is the State of New York. This action, which involves complex law of New York in matters of estates, trusts and fiduciary relationships, is based solely upon diversity of citizenship. *See East Hampton Dewitt Corp. v. State Farm Mutual A. Ins. Co.*, 490 F.2d 1234, 1236 (2d Cir. 1973) (Friendly, C.J.); Friendly, *Marching Into the Third Century,* 16 The Judges' Journal of the American Bar Association, 6 (1977).

The gravamen of the complaint focuses upon various transactions and agreements involving the voting shares of Finch-Pruyn stock which have created an imbalance in the present beneficial ownership of those shares amongst several families, which are descended from the founders of Finch-Pruyn. Serious relief in the form of an accounting, removal of the present trustees and court appointment of new trustees, imposition of a constructive trust upon 2,000 shares of Finch-Pruyn voting stock and punitive damages, is sought by the plaintiffs in their final submission of the issues remaining to be resolved after the trial.

Facts and Legal Discussion

Although detailed in my memorandum-decision of August 13, 1975, it seems necessary to restate the important facts in further detail, developed more fully at the trial, so that the judgment, findings and conclusions, and my reasoning for such, can be better followed and understood.

Finch-Pruyn was originally formed as a partnership in 1865 by Samuel Pruyn, Jeremiah W. Finch and Daniel J. Finch. In 1904, the partners decided to incorporate their business, and to that end, issue 8,000 shares of pre-

ferred stock and 37,500 shares of common stock. All of these shares had a par value of $100; however, only the preferred stock carried the voting rights. Given the earlier withdrawal of Daniel J. Finch, this stock was divided evenly between Samuel Pruyn and the Jeremiah W. Finch family. The three Finch children, George R. Finch, Jeremiah T. Finch and Helen Finch Foulds, received one-sixth of the stock and Samuel Pruyn received the remaining one-half. And, upon the subsequent death of Jeremiah T. Finch, Samuel Pruyn purchased his stock interest in Finch-Pruyn.

At the time Samuel Pruyn's will was admitted to probate, January 2, 1909, he thus owned 5,334 shares of the preferred stock of Finch-Pruyn. His 25,500 shares of common stock was distributed equally among his three daughters, Charlotte Pruyn Hyde, Mary Pruyn Hoopes and Nell K. Pruyn (Cunningham). By the terms of his will (Trust Under the Will), Mr. Pruyn directed that all of his preferred stock be held in trust; that such trust continue during the lives of his two grandchildren, Mary Van Ness Hyde (Mrs. Mary Hyde Whitney and mother of plaintiff, Mary Renz) and Samuel Pruyn Hoopes (son of Mary Pruyn Hoopes and father of defendant Samuel Hoopes, Jr.); and, that upon the expiration or earlier termination of the trust, the corpus thereof be distributed to his "next of kin" by consaguinity.

Unquestionably, this trust provision was designed to retain control of Finch-Pruyn in the Pruyn family for as long as feasible—a fact which is underscored by the direction to the trustees that "[i]n no event shall they sell a part only of such preferred stock" (Plaintiffs' Exhibit 1).

The trustees of the Trust Under the Will of Samuel Pruyn were Maurice Hoopes, Samuel Pruyn's son-in-law, and Louis Brown, Mr. Pruyn's attorney. Their powers, amongst others, included the right to vote the preferred stock. By virtue of a further trust provision, the sur-

viving trustee was empowered to appoint a successor trustee; and, in that capacity, Maurice Hoopes, successor to Samuel Pruyn as the President and Chairman of the Board of Finch-Pruyn, caused his daughter, Mary Hoopes Beeman, defendant herein, and later his son-in-law, Lyman A. Beeman, also a defendant herein, to become the trustees of the Trust Under the Will.

Maurice Hoopes continued as President of Finch-Pruyn until his resignation in 1948. At that time, Lyman A. Beeman was employed by the St. Regis Paper Company, although he was elected to the Board of Finch-Pruyn pursuant to an understanding with the President of St. Regis. In 1949, following the expiration of his resignation notice to St. Regis, Mr. Beeman was elected President of Finch-Pruyn. Presently, Mr. Beeman serves as Chairman of the Board of Finch-Pruyn.

At the time of Samuel Pruyn's death, he was survived by his wife and the three daughters, Charlotte Pruyn Hyde, Mary Pruyn Hoopes, and Nell K. Pruyn (Cunningham). And, as previously noted, upon the expiration or termination of the Trust Under the Will, the voting shares under Paragraph Four of the trust would have been distributed outright to the then living descendants of Samuel Pruyn.

As of 1954, the then living descendants of Samuel Pruyn were Charlotte Pruyn Hyde, Nell Pruyn Cunningham, Mary Hoopes Beeman (daughter of Mary Pruyn Hoopes), Samuel P. Hoopes, Jr. (grandson of Mary Pruyn Hoopes), Mary Hyde Whitney and her children Louis and Mary (daughter and grandchildren of Charlotte Pruyn Hyde). Mary Pruyn Hoopes and her son, Samuel P. Hoopes Sr., died prior to this date. The sole measuring life for the Trust Under the Will, therefore, was Mary Hyde Whitney.

In these circumstances, it would appear that upon the death of Mary Hyde Whitney, assuming the predecease of her mother, Charlotte Pruyn Hyde and her aunt, Nell

Pruyn Cunningham, a distribution of the voting stock would have resulted in equal shares being distributed to Mary Hoopes Beeman, Samuel Hoopes, Jr., Louis Whitney and Mary Whitney Renz. Working control of Finch-Pruyn would thus be divided equally between the Hoopes and Hyde families. Mrs. Cunningham was without issue in 1954 and at the time of her death.

This projected devolution of the Finch-Pruyn voting shares is necessary in order to place the decision to terminate the Trust Under the Will in its proper perspective. Lyman A. Beeman, in his capacity as trustee, as so empowered, dissolved the Trust Under the Will in 1954. The distribution and outright ownership of the voting stock was as follows: 1,778 2/3 shares to Nell Pruyn Cunningham; 1,777 2/3 shares to Charlotte Pruyn Hyde; and, 888 5/6 shares each to Mary Hoopes Beeman and Samuel P. Hoopes, Jr., as daughter and grandson of Mary Pruyn Hoopes.

Thereafter, on June 14, 1954, a single agreement was executed which created three new parallel trusts, hereafter referred to as The 1954 Trust (Plaintiffs' Exhibit 2). The settlors were Charlotte P. Hyde, Nell P. Cunning (the then living daughters of Samuel Pruyn), and Mary H. Beeman, his granddaughter. Mrs. Hyde and Mrs. Cunningham placed all of their preferred shares in the 1954 Trust. Mary H. Beeman placed 777 5/6 preferred shares in this trust, retaining 111 shares outright. Samuel P. Hoopes, Jr., retained his 888 5/6 preferred shares outright. Thus, 4-334 1/6 shares of preferred stock, out of a total of 8,000 shares issued and outstanding, were placed in the new trust. Mary and Lyman A. Beeman continued as trustees; however, defendant Elmer S. White, former Vice-President and Treasurer of Finch-Pruyn, now retired, served as a substitute trustee for Mr. Beeman from January 1, 1963 until August 2, 1969. The reason was that Lyman A. Beeman was engaged in extensive travel abroad.

The provisions of this trust instrument provide, *inter alia:* (1) the trustees are empowered to vote the preferred shares; (2) the trustee instrument is terminable at will by Lyman A. Beeman, the only "disinterested" trustee, or earlier upon the deaths of Mary Whitney Renz, granddaughter of Charlotte P. Hyde, and Thomas Lapham, younger son of Mary H. Beeman by an earlier marriage; and (3) the individual settlors retain a testamentary power of appointment over the principal of their respective trusts.

Although the trustees were specifically empowered with discretionary authority which would allow acrretion of the trust corpus with diverse property, both real and personal, there is no evidence that these trusts ever consisted of anything other than Finch-Pruyn preferred stock, with direct payment of dividend income to the respective beneficial owners.

Those entitled to payment of these dividends are identified at the time of devolution. Thus at the time of the termination of the Trust Under the Will, Mary Hyde Whitney and her children, Louis and Mary, were remainderman. Their beneficial interest in Finch-Pruyn preferred stock devolved upon them pursuant to the terms of the 1954 Trust, and then only upon the deaths of Nell P. Cunningham in July 1962, Charlotte P. Hyde in 1963 and Mary Hyde Whitney in 1971. It is important to emphasize that neither Mrs. Hyde nor Mrs. Cunningham elected to exercise their testamentary power of appointment under the 1954 Trust.

The termination of the Trust Under the Will and the simultaneous creation of the 1954 Trust, therefore, must be viewed as the product of the following factors: (1) a desire to extend the Pruyn family control of Finch-Pruyn; and (2) the confidence which the senior members of the Pruyn family obviously placed in Lyman A. Beeeman's continued stewardship of Finch-Pruyn.

Helen Finch Foulds, daughter of Finch-Pruyn cofounder, Jeremiah W. Finch, and life-long resident of Glens Falls, New York, died on November 27, 1958. At the time of her death, her interest in Finch-Pruyn consisted of 2,000 shares of preferred and 6,300 shares of common stock. Under the terms of her will, the Metropolitan Museum of Art in New York City acquired these shares. This bequest received substantial newspaper coverage in New York City and Glens Falls.

In December 1958, several letters were exchanged between a representative of J. P. Morgan & Co., who had been retained as an investment advisor to the museum, and Lyman A. Beeman, as President of Finch-Pruyn (Plaintiffs' Exhibits 3-6). These letters may fairly be characterized as the initial steps towards negotiating the purchase of the Fould stock. Moreover, the correspondence from Mr. Beeman further discloses that Finch-Pruyn "believed for some time Mrs. Foulds [*sic*] holding of our stock would go to the Metropolitan Museum and we were not surprised at the disposition made in the will."

These negotiations continued for more than 3 1/2 years, culminating in Finch-Pruyn purchasing the 6,300 shares of common stock at $140 per share ($882,000), and Mary H. Beeman, the wife of Lyman A. Beeman, purchasing the 2,000 voting shares at $120 per share ($240,000). These purchases were consummated on August 8, 1962. It is descernible from the record that the museum insisted upon negotiating the sale of stock as a package. Mr. Beeman was the sole negotiator on behalf of Finch-Pruyn and his wife, although Elmer White, then Vice-President and Treasurer of Finch-Pruyn, and defendant Thomas Meath, then Secretary and Director of Finch-Pruyn were responsible for furnishing financial statements for purposes of arriving at a fair price per share. The purchase of the 6,300 shares of common stock by the corporation was subsequently approved at a directors' meeting on August

21, 1962 (Plaintiffs' Exhibit 7). From the testimony and accompanying exhibits, it is evident, and I so find, that these negotiations were conduct at arm's length, in a businesslike manner with no attempt at concealment, and reflected a fair consideration for both the common and preferred stock.

Unquestionably, one of the primary motives underlying the purchase of the Fould stock was to prevent those shares from falling into the hands of other parties whose interests could be adverse to those of Finch-Pruyn. Mrs. Fould's holdings were substantial, representing 25% of the voting stock and approximately 16% of the common stock which carried most of the equity. The purchase of the 6,300 shares of common stock by the corporation was additionally and truly motivated, in my judgment, by a desire to afford middle management level personnel the opportunity to purchase shares of stock in Finch-Pruyn (Tr. 120). I find nothing sinister in this motive; on the contrary, it served the twin salutory purposes of promoting corporate loyalty and providing incentives to management personnel whereby their own financial interests were intimately tied to the continued growth and success of the company.

As previously noted, the purchase price of the Fould common stock was $882,000. In August 1962, Finch-Pruyn had certificates of deposit and cash balances totaling $2,060,000, leaving approximately $1,178,000 in the corporate treasury after the purchase of the common stock.

It is Mr. Beeman's negotiations for, and Mrs. Beeman's purchase of the 2,000 voting shares at a time when both were trustees of the 1954 Trust upon which the plaintiffs focuses and which form the gravamen of this action. A full discussion of this purchase and the legal consequences which attach to it will be deferred to a subsequent portion of this decision. At this juncture, the Court will limit its treatment to the factual context which existed at the time of that purchase.

From the testimony of defendant Elmer White, it is disclosed that the company had no interest in acquiring the 2,000 voting shares and retiring them to the treasury (Tr. 121). The question of whether Finch-Pruyn, as a "closely-held" corporation, whose working control was linked to the 1954 Trust, had a duty to purchase and retire such stock will be discussed herein later.

To my mind, and after review of the record, one point is certain. That is, inasmuch as the corpus of the 1954 Trust consisted entirely of Finch-Pruyn voting stock, there were no assets with which to effect such purchase for the benefit of the 1954 Trust other than to pledge 2,000 shares from the trust corpus as collateral for the necessary loan proceeds. As previously noted, the sole activity involving the administration of the 1954 Trust was the payment of dividends to the beneficial owners of the stock. These payments, I find, were made continuously except for the years 1971-73, at which time Finch-Pruyn was burdened with extensive capital expenditures to comply with State and federal environmental legislation. There is no allegation or evidence disclosing any transactions between the trustees and third parties which involved the corpus of the 1954 Trust or in any way resulted in a diminution of its principal.

The testimony in the record further reveals that no discusions of Mrs. Beeman's purchase took place at the Directors' meeting of August 21, 1962, or at any directors' meetings prior to that date. And, although Lyman A. Beeman testified that he did not have a specific recollection of any conversations with individual members of the Board of Directors regarding his wife's purchase (Tr. 66-8), a fact which was reiterated by the other Directors (Tr. 92, 133, 145), the testimony of the Directors, taken as a whole, discloses and I find that there were numerous prior general discussions within the company concerning Mrs. Beeman's purchase of the 2,000 voting

shares. And, in the instance of Elmer White, his testimony discloses that during the course of numerous conversations with Lyman A. Beeman, he voiced approval of Mrs. Beeman's planned purchase (Tr. 121).

A key element in this litigation is the alleged approval of Mrs. Beeman's purchase by the senior members of the Pruyn family, Mrs. Hyde and Mrs. Cunningham, the two surviving daughters of Samuel Pruyn. Since this necessarily involves an examination and application of New York's Dead Man's Statute, N.Y. CPLR §4519 (McKinney's 1963), discussion of this aspect and the evidence relating to it will also be made in a subsequent part of this opinion.

The only testimony received which was relevant to other descendants of Samuel Pruyn having an opportunity to purchase the Fould stock came from Samuel P. Hoopes, Jr. (Tr. 148). He testified to not having any recollection of being presented an opportunity to purchase those shares.

As previously emphasized, Charlotte Pruyn Hyde died in 1963 without exercising her power of appointment under the provision of the 1954 Trust. Three years earlier, in April and May 1960, her daughter, Mary Hyde Whitney, began an intensive letter writing campaign to her mother. The object of these letters is clear. Mrs. Whitney was urging her mother to exercise a testamentary power of appointment for the benefit of her children and her mother's grandchildren, Mary Whitney Renz and Louis Whitney, whereby the latter would gain control of Mrs. Hyde's 1,777 2/3 shares of Finch-Pruyn voting stock (Defendant's Exhibits B-F). It is my finding, therefore, that the discernible intent of Mrs. Hyde, by her failure to exercise her retained testamentary power of appointment under the 1954 Trusts, was for the clear purposes of retaining working control of Finch-Pruyn in the hands of Lyman and Mary Beeman pursuant to the

terms of the 1954 Trust. In this regard, I find no merit in plaintiffs' contention that this correspondence reflects a desire by Mrs. Hyde to effect a testamentary disposition of her voting shares, but was hindered in the accomplishment of this desire by her health and advanced age (over 90). This finding, contrary to that contention, is underscored by the fact that Mrs. Hyde lived another three years, was fully cognizant of the persistence and nature of her daughter's wishes, and yet, did not exercise her power of appointment. Her daughter, Mary Hyde Whitney, died in 1971.

Nell P. Cunningham died without issue in July 1962, one month prior to consummation of the Fould stock purchases by Finch-Pruyn and Mary H. Beeman. Mrs. Cunningham also did not exercise her retained testamentary power of appointment under the provisions of the 1954 Trust.

The devolution of the respective beneficial interests in Finch-Pruyn voting shares pursuant to the 1954 Trust created an imbalance in the number of voting shares held by the heirs of Mary Pruyn Hoopes and the heirs of Charlotte Pruyn Hyde. Louis Whitney and Mary Whitney Renz are now the beneficial owners of 888 5/6 shares each of the voting shares held in the Charlotte P. Hyde Trust (their grandmother). The present imbalance was created by the devolution of the beneficial ownership of the 1,778 2/3 shares held in the Nell P. Cunningham Trust. Mrs. Cunningham provided for an equal 1/3 distribution to Samuel P. Hoopes, Jr., Mary H. Beeman and Mary Hyde Whitney—or 592 8/9 shares each. Mrs. Whitney's shares devolved equally upon her two children, Mary and Louis, giving them 296 4/9 shares each. All of these shares remain subject to the 1954 Trust which, to this day, still contains sufficient shares for purposes of working control within Finch-Pruyn.

On April 19, 1967, Finch-Pruyn caused a "restated certificate of incorporation" to be filed which contained sev-

eral amendments previously approved at the annual stockholders meeting of January 9, 1967. See N.Y. Business Corporation Law §§ 801, 805, 807 (McKinney 1963). One of these amendments changed the provisions relating to issuance of shares by directors and eliminated the provision specifying the number of directors.

Pursuant to this amendment, the number of authorized voting shares (then the preferred stock) was increased from 8,000 to 10,000 shares, such shares to be retained in the treasury and to be issued only upon "written consent of stockholders owning in the aggregate at least two-thirds of the preferred capital stock of the company then outstanding." There is no evidence before me that any of these shares have been issued, subscribed for, or otherwise disposed of.

On August 20, 1968, Finch-Pruyn caused another "restated certificate of incorporation" to be filed, such restatement, with amendments, following the vote of a special stockholders meeting held on August 19, 1968 (Plaintiffs' Exhibit 20). This action was taken for purposes of recapitalization. As part of this recapitalization, each share of preferred stock was exchanged for a share of 6% cumulative preferred stock and a share of Class A common stock with voting rights; and, each share of common stock was exchanged for a share of 6% cumulative preferred stock and a share of Class B common stock without voting rights.

The total number of all authorized shares of all classes is now 255,500, consisting of 45,500 shares of 6% cumulative preferred stock (par value $100), 10,000 shares of Class A stock (par value $1), and 200,000 shares of Class B common stock (par value $1). The authorized but unissued stock consists of 2,000 shares of Class A stock and 162,500 shares of Class B stock. Again, there is no evidence that any of these latter shares have issued from the corporate treasury.

There are three additional consequences of the 1968 recapitalization which are noted. First, the "restated certificate of incorporation" does not contain the earlier provision which required approval by 2/3 of the then outstanding voting shares prior to any issue, subscription for, or disposition of the additional 2,000 voting shares. Second, the restated certificate eliminates, by exclusion, cumulative voting for directors. *See* N.Y. Business Corporation Law §619 (McKinney 1963). Third, by specific provision in the restated certificate, the shareholder preemptive rights were abolished. See N.Y. Business Corporation Law §622 (McKinney 1963).

The testimony relative to the 1968 recapitalization of Finch-Pruyn came from defendants Elmer White (Tr. 100-07), Thomas Meath (Tr. 127-130), and Samuel Hoopes, Jr. (Tr. 139-144).

Inasmuch as the minutes of the stockholders' meeting of August 19, 1968, do not reflect any discussion of the elimination of cumulative voting, this testimony was largely directed towards the means by which that decision was implemented.

This testimony discloses that although there was no discussion of cumulative voting at the stockholders' meeting, the matter was discussed extensively amongst the directors and was premised, in large measure, upon the recommendations of the Finch-Pruyn auditors and legal counsel. Significantly, the only person directly affected by the elimination of cumulative voting was Samuel P. Hoopes, Jr., who held 888 5/6 voting shares outright and thus could elect himself director. He agreed to this change upon the advice of his counsel.

The following year, on or about January 16, 1969, defendants Mary H. Beeman and Samuel Hoopes, Jr., executed three agreements hereinafter referred to as the Managment Trust (Plaintiffs' Exhibits 10, 11, 13). The purpose of this agreement was to broaden the base upon

which working control of Finch-Puryn was based. There is no evidence, in my judgment, upon which a finding may be premised that Samuel P. Hoopes, Jr. was coerced into entering the Management Trust.

The corpus of this Management Trust consisted of the voting shares which were held outright by Mary H. Beeman and Samuel P. Hoopes, Jr. Mr. Hoopes deposited his 888 5/6 shares of voting stock. Mrs. Beeman deposited 2,360 shares which she held outright, this figure including the 2,000 shares purchased from the Metropolitan Museum in 1962. Between 1960 and 1971, Mrs. Beeman also acquired through purchase and exchange, an additional 572 shares of voting stock previously issued and outstanding and in the hands of third parties (Plaintiffs' Exhibits 12, 22-26). During this same period of time, Mrs. Beeman transferred 173 of these shares. The addition of 111 voting shares which had devolved upon Mrs. Beeman following the death of her mother, and the outright retention of 150 shares, accounts for the 2,360 shares.

A separate agreement provided that Mary Beeman would exercise her testamentary power of appointment retained under the 1954 Trust to effect a transfer of her beneficial interest in 777 5//6 shares of Class A stock to the Management Trust. That Trust would then contain 4,026 2/3 out of 8,000 voting shares of Finch-Pruyn. The trustees of the 1969 Management Trust are the present corporate officers and/or Directors of Finch-Pruyn: Lyman A. Beeman, Chairman of the Board; Thomas E. Meath, President; Lyman A. Beeman, Jr., Senior Vice-President; Samuel P. Hoopes, Jr., Vice President; and, Elmer White, former Vice-President and Treasurer, now retired. Again, the trustees are empowered to vote the stock. The Management Trust is to terminate in 1990 with the generation consisting of Mary Beeman's grandchildren and Samuel Hoopes, Jr.'s

children or earlier in the event of the deaths of all Mary Beeman's grandchildren or by vote of three trustees.

A present projection of the devolution of Finch-Pruyn outstanding voting shares thus reveals that Mrs. Beeman's shares would devolve upon six (6) grandchildren; that Samuel P. Hoopes, Jr.'s shares would devolve upon two (2) children; and, that the Hyde/Whitney/Renz shares would devolve upon Mrs. Hyde's four (4) great-grandchildren.

The present actual or beneficial ownership of Finch-Pruyn voting stock held by the descendants of Samuel Pruyn, however, is as follows:

	1954 Trust	Management Trust	Actual Ownership	Total
Mary H. Beeman	1,370 13/18	2,360	150	3,880 13/18
Samuel P. Hoopes, Jr.	592 8/9	888 5/6		1,481 13/18
Louis Whitney	1,185 5/18			1,185 5/18
Mary Whitney Renz	1,185 5/18			1,185 5/18
Total	4,334 1/6	3,248 5/6	150	7,733

An extremely important element to my mind in this litigation focuses upon plaintiffs' knowledge of the operative facts upon which they base their main charge of breach of fiduciary duty by the defendants in their trustee and corporate capacities. There are three sources of evidence: (1) a letter written by defendant Lyman Beeman to Mary Hyde Whitney on September 10, 1963, shortly after the death of her mother, Charlotte Pruyn Hyde (Tr. 245-49); (2) the September 15, 1969 meeting

between Franklin Renz and Elmer White (Tr. 108-16, 168-91); and, (3) a letter dated November 2, 1972, from plaintiffs' former counsel to the plaintiff, Franklin Renz (Tr. 199-200). The attorneys for the defendants have objected to the admission of this letter and others in a series, (Plaintiffs' Exhibits 29-33), because their content contains conclusions of legal counsel. I will receive them into evidence for the sole purpose of pinpointing the date upon which plaintiffs allege they acquired actual knowledge of the stock purchase by Mrs. Beeman in August 1962.

The letter of September 10, 1963 (Defendants' Exhibit H) was written to Mrs. Whitney in response to the latter's request for information relative to the voting control of the Finch-Pruyn stock. This letter provides, in pertinent part:

> [T]he control was in the Preferred stock and concentrates mainly in the Trust set up originally under the Will of Samuel Pruyn, which has been changed to some extent but still controls over 50% of the stock. Polly [Mary Beeman] and Elmer White are trustees of this Trust *and in addition Polly owns outright about 30%*. This control has been in the hands of Maurice Hoopes, your father and Polly pretty much through the 50 years of its existence (underscoring supplied).

On or about September 15, 1969, Franklin Renz with Elmer White at the offices of Finch-Pruyn in Glens Falls, New York. The meetings lasted over a period of two days. Mr. Renz's visit was prompted by the urging of his mother-in-law, Mary Hyde Whitney, and he represented her in his capacity as executor under her will. The purpose of the meetings was to discern the status of the various Charlotte P. Hyde trusts; and, to that end, Mr. White furnished handwritten summaries pertaining thereto (Plaintiffs' Exhibit 21).

During these meetings, there was no specific disclosure of Mrs. Beeman's purchase of the Fould stock nor was there a specific disclosure as to the existence of the Management Trust. It is my finding that Mr. Renz was provided extensive information concerning the distribution of the Finch-Pruyn voting stock; and, this is evidenced by the copious handwritten notes taken by Mr. Renz during the course of those meetings (Plaintiffs' Exhibits 27, 28). It is not clear whether and to what extent these notes were taken contemporaneously with Mr. White's explanations, or in preparation for the second meeting (Tr. 180-91); nevertheless, certain facts are readily established. Franklin Renz knew or was told that there were 8,000 shares of voting stock issued and outstanding; that voting control for the company initially rested with the Trust Under the Will; that the present voting control rested with the 1954 Trust; that Mrs. Beeman owned 2,270 voting shares outright; that the shares of Mary Pruyn Hoopes, Charlotte Pruyn Hyde and Nell Pruyn Cunningham devolved upon their direct descendants and in accordance with the provisions of the 1954 Trust; and, that there had been a recapitalization of Finch-Pruyn in 1968. In short, it is my conclusion that Franklin Renz was given an accurate and extensive account of the actual and beneficial ownership of the Finch-Pruyn voting stock, and there is no evidence in the record that there was any attempt to conceal full information in this regard nor mislead him as to stock ownership and control.

At the time of trial, plaintiffs' counsel specified for the record a substantial number of claims and allegations upon which no proof would be made. Thus, the Fourth, Eighth and Ninth Causes of Action set forth in the complaint were withdrawn in their entirety. Similarly, the allegations under the Sixth and Seventh Causes of Action, to the extent that they are derivative, were also withdrawn. In sum, plaintiffs have withdrawn all their

derivative claims and those allegations premised upon defendant Hoopes' purported defalcations as trustee, as well as those premised upon corporate waste and mismanagement.

In this conformance of the pleadings with the proof at the trial, the *sine qua non* of plaintiffs' complaint is that the negotiation and purchase of the 2,000 voting shares, in addition to Mrs. Beeman's other purchases of voting shares constituted a *per se* violation of Lyman and Mary Beeman's fiduciary duty as trustees; that these negotiations and purchases, coupled with their concealment, were part of a fraudulent scheme designed to acquire and maintain ownership and control of Finch-Pruyn for the benefit of Lyman Beeman and his family; that the individual corporate officers and directors participated in this unlawful scheme to keep Lyman A. Beeman in control and to perpetuate themselves as officers and directors of Finch-Pruyn; and, that their participation in such conspiracy was evidenced by their concealment of the purchase of the Fould stock by the company and Mrs. Beeman, by the 1968 recapitalization of Finch-Pruyn, and by their participation in the 1969 Management Trust, the result of which was to give Lyman A. Beeman sufficient voting control to effect extraordinary corporate action—i.e. merger, sale of assets, or dissolution.

These allegations must be considered to ascertain whether the plaintiffs have carried their burden of proof by a fair preponderance of the evidence and in view of the findings of fact made previously herein, and in light of the established legal principles that apply in situations of this kind.

In short, given the several juxtapositions of theories upon which this litigation was conducted, it appears that plaintiffs' hopes for recovery are now premised upon: (1) Lyman A. Beeman's and Mary Beeman's alleged breach of fiduciary duty and fraudulent concealment in

the negotiation and purchase of Finch-Pruyn voting stock; and (2) the defendant corporate officers' and directors' alleged breach of fiduciary duty. In the latter instance, I must assume that plaintiffs (or, at least Mary Whitney Renz) are suing in their individual capacities as stockholders of Finch-Pruyn.

The parties have submitted extensive briefs upon the several legal principles which should govern the disposition of this litigation. Of primary importance is to initially define the scope of Lyman A. and Mary Beeman's duties as trustees of the 1954 Trust.

It is familiar doctrine that in almost all cases, a trustee is held to the highest standard of fiduciary responsibility; that is, one which exacts uncompromising and "undivided loyalty." *See City Bank Farmers Trust Co. v. Cannon,* 291 N.Y. 125, 131-2 (1943); *Meinhard v. Salmon,* 249 N.Y. 458, 464 (1928); *Matter of Rothko,* 84 Misc. 2d 830, 847-8 (Surr. Ct. 1975), *modified on other grounds,* 56 A.D. 2d 499 (1st Dept. 1977).

Nevertheless, in certain instances, the New York courts have recognized a departure or relaxation from the doctrine of "undivided loyalty." In these cases, the courts have examined the intent of the settlor in terms of his actions and by the provisions of the trust instrument. Therefore, in those instances where the acts of the settlor place the trustee in a position which may entail conflicting interests, and the trust instrument contains exculpatory provisions, the law only requires that the trustee act honestly and in good faith. *Matter of Balfe,* 245 A.D. 22, 24-5 (2d Dept. 1935); *O'Hayer v. de St. Aubin,* 30 A.D. 2d 419, 423-25 (2d Dept. 1968); *Matter of Kellogg,* 35 Misc. 2d 541, 545 (Sup. Ct. 1962); *Matter of Dow,* 32 Misc. 2d 415, 419 (Surr. Ct. 1955), *modified on other grounds,* 3 A.D.2d 968 (4th Dept. 1957), *affirmed,* 5 N.Y.2d 739 (1958).

The settlors of the 1954 Trust, particularly Charlotte Pruyn Hyde and Nell Pruyn Cunningham, selected Ly-

man A. Beeman as trustees for the administration of this *inter vivos* trust at a time when he was serving as President and director of Finch-Pruyn. In recognition of the conflicting loyalties which Lyman A. Beeman would serve, the trust instrument contains numerous exculpatory provisions relative to its administration, including a provision permitting the trustees to:

> participate in any plan of reorganization, consolidation, merger, combination, or similar plan; to consent to such plan and any action thereunder, or to any contract, lease, mortgage, purchase, sale or other action by any corporation.

Unquestionably, the broad exculpatory provisions, including the one cited above, were deemed essential to provide Lyman A. Beeman with the necessary flexibility to manage the corporation. More importantly, these provisions accorded in my judgment and indicate beyond any doubt the confidence which the settlors had in Mr. Beeman's administration of Finch-Pruyn and the trust indenture which afforded him working control of the corporation.

In circumstances where a trustee, through individual and/or representative stock ownership, controls the conduct of the corporation, it is settled law amongst the New York courts that the duties of the trustee extend to the trust estate as well as to the operation of the corporation. *Matter of Hubbell,* 302 N.Y. 246 (1951) (invasion of the trust principal); *Matter of Auditore,* 249 N.Y. 335 (1928) (misappropriation of trust assets); *Matter of Luce,* 17 A.D. 2d 636 (2d Dept. 1962); *Matter of Shehan,* 285 A.D. 785 (4th Dept. 1955) (deprivation of income to the life beneficiary); *Matter of Kirkman,* 143 Misc. 342 (Surr. Ct. 1932) (exclusion of cofiduciaries from trust management).

But, in circumstances where a settlor intends to exculpate and recognize the conflicting loyalties which may confront a trustee in whom he has confidence, the New York courts nevertheless judge the actions of the trustee with working control of a corporation by the single criterion of good faith. *O'Hayer v. de St. Aubin, supra* at 425. The question, therefore, is whether the negotiations for, and the purchase of Finch-Pruyn voting stock by Lyman A. and Mary Beeman constituted bad faith. It is my judgment that such actions were not proven satisfactorily as conduct that should be accepted as evidence of bad faith or breach of trust. Moreover, it is my firm conviction, from a review of all the evidence, that such actions were also compatible with the interests of the corporation and the trust.

In terms of the interest of the 1954 Trust, it was previously mentioned herein and found that there were no assets in the trust corpus with which to purchase the Fould stock. In order to effect such a purchase, the trustees would necessarily have had to pledge almost half of the trust principal and sacrifice the income therefrom. Such a purchase, therefore, would seemingly have violated the trustees duty to avoid the sacrifice of income for the purpose of increasing the value of the principal. *See Matter of Sheehan, supra* at 791; Restatement Trusts, §232, comment b.

Similarly, upon these same grounds, plaintiffs' reliance upon *Wooten v. Wooten,* 151 F.2d 147 (10th Cir. 1945); 159 F.2d 567 (10th Cir.), *cert. denied,* 331 U.S. 835 (1947), is misplaced. *Wooten* involved a trustee's acquisition of "connected trust property" in competition with, and to the detriment of, the trust beneficiaries. *Wooten* is distinguishable from the facts herein because, in that case, there were funds within the trust corpus to effect a purchase for the benefit of the trust beneficiaries, and the trustee deliberately concealed and misrepresented this fact, among others, in order to acquire more than 50% of the outstanding stock. That case also implies by its facts that

the trustee had a duty to offer the "connected trust property" to the beneficiaries as a "trust opportunity."

In applying that principle to the matter herein, I am confronted by the much criticized provisions of New York's Dead Man's Statute. N.Y. CPLR §4519 (McKinney 1963). *See* 5 Weinstein, Korn & Miller, New York Civil Practice §4519.01-23 (1974).

At the time of Helen Finch Fould's death in 1958, all of the settlors of the 1954 Trust were still living. At the trial, Lyman A. Beeman sought to testify to various conversations with Charlotte P. Hyde and Nell P. Cunningham, the substance of which, as later shown by an offer of proof, entailed disclosure of the Fould stock purchases by Finch-Pruyn and Mary H. Beeman (Tr. 251-53). I sustained, as my interpretation of the statute commanded, plaintiffs' objections on the grounds of the Dead Man's Statute, *see* Federal Rules of Evidence 601, premising that judgment upon the following grounds: (1) that Lyman A. Beeman was a person interested in the event at the time of trial; (2) that such testimony was offered in his own behalf; (3) that such testimony was against a representative of the deceased; and, (4) that such testimony concerned transactions and communications with the deceased. *See* 5 Weinstein, Korn & Miller, *supra* at pp. 461-2.

Nevertheless, upon a reflection of all the other testimony in this respect, it is my finding that it was the usual practice within Finch-Pruyn to discuss corporate matters within the family. *See Matter of Shehan, supra* at 793. Moreover, it is my judgment that this finding is established as an "independent fact" apart from any specific personal transaction or communication with the deceased. Although the distinction between an independent fact and a personal transaction is not a paradigm of clarity, it is settled law in New York.

> [The Dead Man's Statute] does not deprive [a witness] of the right to testify to any material fact known to him not involving the disclosure of a personal transaction with the decedent, although such fact may indirectly prove or disprove a personal transaction upon which the suit is founded. In other words, the testimony of the survivor is not excluded because it bears upon the issue to be decided, or because it bears upon a personal transaction which is itself the subject of inquiry. It is excluded only when it is in effect a disclosure of what has occurred between the witness and the deceased in relation to the subject in controversy. *Nay v. Curley,* 113 N.Y. 575, 581 (1889).

Admittedly, by the application of the statute, there does remain a gap in the evidence. On the one hand, an inference arises from a finding that corporate affairs were disclosed and discussed within the family. This inference is that the senior members of the Pruyn family were apprised of the Fould stock purchases. On the other hand, the direct testimony concerning important conversations bearing on that fact is barred by the Dead Man's Statute which, in effect, impedes this court from rendering findings of credibility. In this circumstance, it is uncertain whether a fair inference of knowledge and consent by Mrs. Hyde and Mrs. Cunningham, as I have found, is sufficiently established to sustain an estoppel. *See Matter of Cowles,* 22 A. D.2d 365, 379, (1st Dept. 1965), *aff'd* 17 N. Y.2d 567 (1966); *City Bank Farmers Trust Co. v. Cannon,* 291 N. Y. 125, 133 (1943); *Central Hanover Bank & Trust Co. v. Russell,* 290 N. Y. 593, 594 (1943); *Matter of Grace,* 42 Misc. 2d 214, 217 (Surr. Ct. 1964).

The record reflects that Lyman A. Beeman's dealings with the family were characterized by courteousness and responsiveness, especially to inquiries concerning the trust. This is disclosed by his letter to plaintiff's mother, Mary

Hyde Whitney (Defendants' Exhibit H). Plaintiffs' counsel also objected to this evidence upon grounds of the Dead Man's Statute; however, it is my judgment that it is admissible upon the authority of *Yager Pontiac, Inc. v. Fred A. Danker & Sons, Inc.*, 41 A. D.2d 366, 368 (3d Dept. 1973), *aff'd* 34 N. Y.2d 707 (1974).

In my judgment, this evidence of disclosure, including that furinshed to the plaintiff, Franklin Renz, at the September 15, 1969 meeting with Elmer White is enough to refute plaintiffs' claim of fraudulent concealment.

Plaintiffs have further asserted that prior to any negotiation and purchase of the Fould stock, the defendant trustees, Lyman A. and Mary Beeman should have sought prior judicial approval. *Matter of Scarborough Properties Corp.*, 25 N. Y.2d 553 (1969); *Matter of Hubbell*, 302 N. Y. 246, 254 (1951). These cases involved trustees who acquired trust property, a situation fraught with obvious danger to the interests of the trust beneficiaries. This, however, is not the situation herein. The Fould stock was never an asset of the 1954 Trust. By plaintiffs' reckoning, it would necessarily follow that any corporate activity which may have an impact upon the trust estate must seek prior judicial scrutiny and approval. A few examples disclose the lack of merit in these contentions. Thus, the increase in the number of authorized voting shares of Finch-Pruyn from 8,000 to 10,000 undoubtedly has some impact upon the trust beneficiaries. So too, does the elimination of cumulative voting. In this regard, it must be remembered that plaintiffs only have a beneficial interest in their shares. Yet, it is doubtful, in my judgment that each of these acts would necessitate prior judicial scrutiny and approval.

There are, of course, instances in which trust beneficiaries have required trustees to treat transactions of the corporation as though they were his own transactions as trustee. These cases, however, involved clear and

egregious defalcations in the administration of the trust. *See e.g., Matter of Auditore*, 249 N. Y. 335 (1928). The lesson of these latter cases is clear. That is, a trustee who is also an officer or director of a corporation "may not use the corporate charter as a shield to protect himself from censure." *Matter of Hubbell, supra* at 259; *Matter of Shehan, supra.* So too, in a proper case, the courts may direct certain corporate action, *Matter of McLaughlin*, 164 Misc. 539 (Surr. Ct. 1937). The principles of these cases are long settled; however, they are inapposite to the factual circumstances found herein.

Officers and directors of a corporation occupy a quasi-fiduciary relation to the corporation and its stockholders. *Schwartz v. Marien*, 37 N.Y.2d 487, 492 (1975); *Equity Corp. v. Groves*, 294 N.Y. 8, 12 (1945). In that capacity, they are bound to:

> discharge the duties of their respective positions in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions. N.Y. Business Corporation Law § 717 (McKinney 1963).

A cogent expression of these general principles was set forth in *Greenbaum v. American Metal Climax, Inc.*, 27 A.D.2d 225, 231 (1st Dept. 1967):

> The acts of the defendant directors within the powers of the corporation, in the lawful and legitimate furtherance of its purposes, in good faith and the exercise of honest judgment, are valid and conclude the corporation and stockholders. Questions of policy of management, expediency of contracts or action, adequacy of consideration, lawful appropriation of corprate funds to advance corporate interests are left solely to their honest and unselfish

> decision, for their powers therein are without limitation and free from restraint, and the exercise of them for the common and general interests of the corporation may not be questioned although the results show that what they did was unwise or inexpedient (citations omitted).

And, more recently, the New York Court of Appeals further defined these principles in terms of the presence of a "bona fide business purpose." *Schwartz v. Marien, supra,* at 492. Of course, the degree of standard care required, is dictated by the individual factual context of each case. *See Kavanaugh v. Commonwealth Trust Co.,* 223 N.Y. 103 (1918); *Barr v. Wackman,* 36 N.Y.2d 371, 381 (1975).

The various actions of the corporate officers and directors of Finch-Pruyn, therefore, must be examined in light of these settled doctrines.

In terms of Finch-Pruyn's purchase of 6,300 shares of common stock which carried most of the equity, the courts of New York have held that an officer who represents the corporation in efforts to purchase previously issued and outstanding shares is under a fiduciary duty to acquire such stock at the best possible terms. He may not usurp a "corporate opportunity" for purposes of personal financial aggrandizement. *Matter of Kelly v. 74 W. Tremont Avenue Corp.,* 4 Misc. 2d 533 (Sup. Ct. 1956), *aff'd,* 3 A.D.2d 821 (1st Dept.), *aff'd,* 3 N.Y.2d 973 (1957). I have previously found and now reaffirm that Lyman A. Beeman's negotiations on behalf of Finch-Pruyn were in conformity with this standard. Moreover, to the extent that such purchase was motivated by a desire to distribute such stock to middle management personnel, it was made in good faith and served a "bona fide business purpose."

Analogously, I find that the officers and directors acted in good faith for a bona fide business purpose in not purchasing the 2,000 voting shares and retiring same in the corporate treasury. Although the funds to effect such purchase were available, the record amply demonstrates that Finch-Pruyn was embarking in a sound business decision upon an extensive program of capital expenditure, first to modernize and expand its facilities, and subsequently, to comply with state and federal environmental legislation.

And, in this vein, two further tenets must be emphasized. First, a corporation generally has no interest in its outstanding stock or in dealings in its shares amongst its stockholders. *Hauben v. Morris,* 255 A.D. 35, 46 (1st Dept. 1938); *Mannheimer v. Keehn,* 30 Misc. 2d 584, 595 (Sup. Ct. 1943), *modified on other grounds,* 268 A.D. 813 (4th Dept. 1944), *amended on other grounds,* 268 A.D. 845 (4th Dept. 1944). Moreover, the following language in *Mannheimer v. Keehn, supra* at 597-8, fits the facts here as I find them to exist at the time in question:

> Complications present themselves where stock is closely held, and dealings on the part of officers or directors in acquiring it which appear to be inequitable should be scrutinized. In this case, there is no evidence of interest of other voting trustees or directors in Mr. Keehn's stock purchases, or that they have combined to promote his or their personal advantage at the expense of the corporation.

Secondly, in my judgment, the sole motive in purchasing the previously issued and outstanding voting shares by the corporation would be to protect the proportional beneficial interests of the Hoopes and Hyde families in the Finch-Pruyn voting stock. In terms of exercising the power to vote those shares, assuming their purchase for the corporate treasury, it appears indisputable that these shares, in any event, would be voted in

accordance with Lyman A. Beeman's existing working control of Finch-Pruyn. More importantly, however, it cannot be disputed that the officers and directors of a corporation owe their fiudciary duty to *all shareholders,* not just those who have a beneficial interest in the voting shares. To the extent that any conflict of fiduciary obligation exists to the holders of the common and voting shares of Finch-Pruyn, it is my judgment that the decision not to purchase the voting shares was a proper accommodation between these two groups, especially under circumstances where numerous shares of the common stock were held by persons other than the descendants of Samuel Pruyn.

Plaintiffs rely on *Schwartz v. Marien, supra,* claiming that they were not accorded uniform treatment due to shareholders. The *Schwartz* case is not controlling here. That case involved a closed corporation in which the directors sold authorized but previously *unissued* treasury shares to themselves without permitting a similar participation by the plaintiff. This action upset plaintiff's proportionate stock interest in the corporation which was 50% prior to such purchases. In my judgment, the holding of that case is limited to those instances in which directors issue treasury shares to themselves for purposes of vesting voting control in one family to the disadvantage of another family. That is not this case. Plaintiffs herein were and continue to be minority shareholders. And, working control of Finch-Pruyn has continuously rested with Lyman A. Beeman at all times examined in this litigation. The applicability of *Schwartz* to these facts would only arise if the additional 2,000 voting shares of Finch-Pruyn, presently held in the treasury, were issued to third parties, without the participation of the plaintiffs, and if such departure from uniform stockholder treatment served no independent and bona fide corporate interest. As previously found, however, there is no evidence of any transactions concerning this stock.

Finally, it is my judgment that the decisions and consequences accompanying the recapitalization of Finch-Pruyn in 1968; and, the creation of the Management Trust in 1969, were in conformity with the fiduciary duty to act in good faith and for bona fide independent business objectives. In short, it is my judgment that the corporate managers of Finch-Pruyn have, at all times material herein, acted in a manner and with a purpose which conforms to the standard of fiduciary and business responsibility owed to the corporation and its stockholders. Therefore, I find plaintiffs' contentions of conspiracy amongst the officers and directors of Finch-Pruyn to be refuted by the factual findings and applicable law.

Statute of Limitations

Given the previous disposition of this litigation upon the merits, only a brief discussion of the statute of limitations is necessary. The question was referred to in my previous decision denying the preliminary injunction and was accorded weight on the factor of likelihood of success.

Plaintiffs have variously described their action against the trustees Lyman A. and Mary Beeman as one of breach of fiduciary duty and/or fraudulent concealment. For purposes of the statute of limitations, each theory has subtle distinctions, which, in this case take on an added measure of complexity by the adoption of the New York Civil Practice Law and Rules in 1963 (CPLR).

At the outset, it appears that a decision as to whether the action is denominated legal or equitable is not determined solely by the prayer for relief. *See Erbe v. Lincoln Rochester Trust Co.,* 3 N.Y.2d 321, 325-6 (1957).

The New York statute of limitations presently applicable to equitable actions is the omnibus six-year statute.

CPLR §213(1). Until September 1, 1963, the effective date of the CPLR, the period of limitations was 10 years. *See* CPA §53. If an equitable action arose prior to September 1, 1963, but was not sued upon until after September 1, 1963, the action was not barred until the 10-year period had expired. *Beresovski v. Warszawski,* 28 N.Y.2d 419, 422 (1971). If, however, the cause of action arose after September 1, 1963, the new six-year statute governs. Under either of these time periods, plaintiffs' cause of action relating to the 1962 purchase of the Fould stock is barred. Moreover, it is my judgment, from the facts previously found, that this is not a proper case for the application of the doctrine of equitable estoppel. *See Erbe v. Lincoln Rochester Trust Co.,* 13 A.D.2d 211, 213 (4th Dept. 1961), *appeal dismissed,* 11 N.Y.2d 754 (1962); 1 Weinstein, Korn & Miller, New York Civil Practice and Procedure ¶201.13 (1977).

And, in terms of those stock transactions engaged in by Mrs. Beeman during the six-year period prior to the filing of the complaint of September 24, 1974, though not barred by the statute of limitations; they nonetheless, do not furnish any basis for a finding of breach of fiduciary duty.

In terms of the statute of limitations in cases of *actual* fraud, both the prior provision, CPA §48(5), and the present provision, CPLR §213(9), afford a six-year period of limitations, with various distinctions regarding discovery. The CPLR affords plaintiff a two-year discovery provision. CPLR §203(f). *See Hoff Research & Development Laboratories, Inc. v. Philippine National Bank,* 426 F.2d 1023, 1025-27 (2d Cir. 1970). Inasmuch as I have previously found that there was no concealment with intent to defraud on the part of any defendants, further discussion relative to plaintiffs' claims of discovery in November 1972 would be academic. There is a failure of proof on the cause of action for actual fraud.

Presumably, actions against corporate officers and directors which are not derivative, but maintained by shareholders in their own right, are subject to the six-year omnibus statute of limitations provided in CPLR §213(1). Such actins accrue from the date of the commission of the alleged wrong. *Pollack v. Warner Brothers Pictures, Inc.,* 266 A.D. 118, 120 (1st Dept. 1943). Measured by this standard, all of the complained of acts, save one, are barred by the statute of limitations. The only action thus subject to examination is the creation of the 1969 Management Trust, of which, the corporate officers and directors are trustees. I have previously found that such action was taken for a bona fide business purpose; namely, to provide and extend working control of Finch-Pruyn to the succeeding generation of corporate managers. There is no basis upon which I find that such action contemplated some fraud, oppression or wrong against the plaintiffs. *Cf. Mannheimer v. Keehan, supra* at 588.

In my previous memorandum decision, I characterized this action as essentially being a family dispute. That conviction is now fortified by the trial. It is understandable that distrust and suspicion arise from estate and trust planning which bestows an uneven distribution of its bounty upon some persons, to the disadvantage of others. As I noted within, a fair inference arises that the senior members of the Pruyn family in all probability wished to bestow that advantage upon Mary Beeman, confident that Finch-Pruyn, under the stewardship of her husband, Lyman A. Beeman, would continue to prosper and benefit all of Samuel Pruyn's descendants. But, distrust and suspicion alone, cannot afford plaintiffs the drastic relief sought, particularly when premised upon serious charges of fraud and breach of fiduciary obligations on the part of the trustees and the corporate managers of Finch-Pruyn that are unproven by this trial record.

The foregoing memorandum-decision constitutes my findings of fact and conclusions of law. It is my judgment that plaintiffs have failed to sustain their claims by a fair preponderance of the evidence; therefore, the complaint must be and is dismissed in its entirety.

It is so Ordered.

Dated: November 22, 1977
Albany, New York

JAMES T. FOLEY
United States District Judge

Exhibit H From District Court Trial.

FINCH
PAPERS

September 10, 1963

Dear Nessie:

Several days ago Franklin called me in regard to some questions you had about control of Finch, Pruyn stock. As I told him the control was in the Preferred stock and concentrates mainly in the Trust set up originally under the will of Samuel Pruyn, which has been changed to some extent but still controls over 50% of the stock. Polly and Elmer White are trustees of this Trust and in addition Polly owns outright about 30%. This control has been in the hands of Maurice Hoopes, your father and Polly pretty much through the 50 years of its existence. It is so worded that the control will stay in the family through the life times of Mary and Tommy Lapham.

A synopsis of Auntie Hyde's will has been made by Al Clark and I am enclosing it herewith.

Auntie Hyde participated in income from securities left by her father and now upon her passing these securities go to you. They amount to something in the vicinity of $340,000 which will be completely in your ownership and control. The necessary papers and legal work is being prepared and these securities will be turned over to you shortly.

In addition there is income from these securities from the first of the year and also income from the Preferred stock in Finch, Pruyn which is in the controlling Trust but income will now go to you and upon your death will go to your two children. This money will be turned over to you as we can take care of the legal requirements.

There may be other things you want to know and I will be happy to try to answer any questions you have to ask.

Affectionately,

LYMAN

Transcript of Testimony of Lyman Beeman at District Court Trial Concerning Exhibit H.

(228)

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

MARY WHITNEY RENZ, as a beneficiary under the Charlotte P. Hyde Trust and the Nell P. Cunningham Trust and the Charlotte P. Hyde Testamentary Trust; FRANKLIN W. RENZ, as Executor under the Last Will and Testament of Mary P. Whitney who was a beneficiary under the Charlotte P. Hyde Trust and the Nell P. Cunningham Trust and the Charlotte P. Hyde Testamentary Trust; FRANKLIN W. RENZ, as Executor under the Last Will and Testament of Mary P. Whitney, and MARY WHITNEY RENZ, derivatively and in the right and for the benefit of Finch, Pruyn & Company, Inc.,

Plaintiffs,

against

LYMAN A. BEEMAN and MARY H. BEEMAN, individually and as Trustees of the Charlotte P. Hyde Trust and the Nell P. Cunningham Trust, both created the 14th day of June, 1954; LYMAN A. BEEMAN, SAMUEL P. HOOPES, THOMAS E. MEATH, LYMAN A. BEEMAN, Jr. and ELMER S. WHITE, as Trustees of a Trust established under Agreements dated January 16, 1969, with Mary H. Beeman and Samuel P. Hoopes; LYMAN A. BEEMAN, MARY H. BEEMAN and SAMUEL P. HOOPES as Trustees under the Charlotte P. Hyde Testamentary Trust; MARY H. BEEMAN and SAMUEL P. HOOPES as

Beneficiaries under the Nell P. Cunningham Trust; LYMAN A. BEEMAN, individually and as Director, Chairman of the Board and Chief Executive of Finch, Pruyn Pruyn & Company, Inc.; SAMUEL P. HOOPES, Individually and as Director and President of Finch, Pruyn & Company, Inc.; LYMAN A. BEEMAN, Jr., individually and as Director and Senior Vice-President of Finch, Pruyn & Company, Inc.; SAMUEL P. HOOPES, individually and as Director and Vice-President of Finch, Pruyn & Company, Inc.; MARY H. BEEMAN and ELMER S. WHITE, individually and as Directors of Finch, Pruyn & Company, Inc.; and FINCH, PRUYN & COMPANY, Inc.,

Defendants.

74-CV-400

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(229) Proceedings in the above-entitled action were continued pursuant to adjournment at the United States District Court in and for the Northern District of New York, on Friday, May 6th, 1977, at the Federal Building, Albany, New York, before the Hon. James T. Foley, Chief, United States District Court Judge, presiding.

(230) Appearances:

McGinn, Volk & Tippins, P.C., Attorneys and Counsellors at Law, 90 State Street, Albany, New York 12207.

Arthur F. McGinn, Jr. and Robert M. Brown, Of Counsel, appearing on behalf of plaintiffs,

and

Simpson, Thacher & Bartlett, Attorneys and Counsellors at Law, One Battery Park Plaza, New York, New York 10004.

Rogers M. Doering and Thomas Bistline, Of Counsel, appearing on behalf of Lyman A. Beeman and Mary H. Beeman, defendants,

and

Bouck, Holloway & Kiernan, Attorneys and Counsellors at Law, 107 Columbia Street, Albany, New York 12210.

Warner M. Bouck, Of Counsel, appearing on behalf of Samuel P. Hoopes, Jr., Defendant,

and

DeGraff, Foy, Conway & Holt-Harris, Attorneys and Counsellors at Law, 90 State Street, Albany, New York 12207.

John T. DeGraff, Jr., of Counsel, appearing on behalf of Thomas E. Meath, Defendant,

and

Pattison, Herzog, Sampson & Nichols, P.C., Attorneys and Counsellors at Law, 11 North Pearl Street, Albany, New York 12207.

(231) Jacob H. Herzog, of Counsel, appearing on behalf of Lyman A. Beeman, Jr., Defendant,

and

Hinman, Straub, Pigors & Manning, Attorneys and Counsellors at Law, 90 State Street, Albany, New York 12207.

Donald D. DeAngelis, Of Counsel, appearing on behalf of Elmer White, Defendant,

and

McPhillips, Fitzgerald & Meyer, Attorneys and Counsellors at Law, 288 Glen Street, Glens Falls, New York 12801.

John E. Fitzgerald and Martin A. Meyer, of Counsel, appearing on behalf of Finch, Pruyn & Company, Defendant.

(232) Morning Session—May 6, 1977

The Court: All right, Mr. Doering.

Mr. Doering: Thank you, Your Honor. Mr. Beeman.

LYMAN A. BEEMAN, resumed the stand, called as a witness in behalf of the defendants, having previously been sworn testified as follows:

Mr. Doering: You don't have to be sworn again Mr. Beeman.

The Court: You've already been sworn in Mr. Beeman.

Direct Examination by Mr. Doering:

Q. Mr. Beeman, would you give us just briefly a history of your business life, before the time that you came to Finch, Pruyn, please, very briefly. A. Brought up in paper mill town of Nina, Wisconsin, where Kimberly-Clark had headquarters, so I was interested as a child, seeing the mill and playing around the mill. In high school, I started to work in the summer time and continued working in the Kimberly-Clark mills during summer vacation, throughout my college education, and before I went in the Army. I came back from the Army, I went back to Kimberly-Clark Company, and they put me—through training school.

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(245) figures for 1944 to 1976 was received in evidence on May 6, 1977.)

(Defendant's Exhibit H marked for identification on this day, May 6th, 1977.)

(Plaintiff's counsel examining Defendant's Exhibit H.)

Mr. McGinn: Your Honor, this purports to be a letter—1963, from Mr. Beeman to Mrs. Whitney, and I object to its admission or even any discussion about it, because it would necessarily—any such testimony would necessarily entail transactions between this witness and Mrs. Whitney. Under the Dead Man's Statute, any such testimony is incompetent.

Mr. Doering: Not the papers, Your Honor, not the papers.

The Court: I should see it. Is this H?

(Document handed to the Court.)

Mr. Doering: The statute refers to testimony, your honor. I submit that a letter—a document, is not testimony, under the cases and it seems to me that a situation where, the plaintiff is complaining that an active concealment took place, and then is (246) objecting to letters showing disclosure, it is not the kind of case where the Dead Man Statute ought to be extended beyond its words.

The Court: Well, this Polly referred to is Mr. Beeman's wife.

Mr. Doering: Yes sir, wife.

The Court: All right.

Mr. McGinn: Your Honor, my objection is to any testimony by this witness with respect to writing the letter, mailing the letter. The cases are very clear, that such acts are transactions within the statute, and with respect to that letter of Mr. Doering's client, as far as the merits of the case are concerned, am not overly concerned about that letter going in and you having the letter, for what it's worth, but I am in the position at the moment, that if I do not object to any testimony by this witness as to the writing of the letter, sending the letter or not, he has in this case he has received the letter, all of such testimony would involve transactions within the means of the statute. The cases are clear, that almost any type of contact, indirect or— (247) the barest type of contact is a transaction, so if I don't stand now and make the objection, I'm in a dilemma. If I don't object now, I have the problem of waiver.

The Court: Mr. Doering, I have your brief, now what cases wherein do you cite in supporting this admission of this letter. Should we talk about on page three?

Mr. Doering: On page three and four, Your Honor.

The Court: Well, I think you should state those cases for the record. At least the ones that relate to the letter and so forth.

Mr. Doering: Your Honor, I don't think I can. I don't know what is in here. I don't remember them that well.

The Court: No, I mean just to state their titles and report the numbers.

Mr. Doering: Yes.

The Court: And it will be part of this record.

Mr. Doering: All right, sir. There is—we have cited *Yager Pontiac, Inc. v. Danker and Sons,* 41 A. D. 2d 366, aff'd 34 (247A) N. Y. 707.

Mr. McGinn: We have cited the same case, Your Honor.

Mr. Doering: We have cited, yes.

Mr. Meyer: I think that should be 34 N. Y. 2d for the record.

Mr. Doering: I think that is right, and I think that this is a misprint in the brief.

(248) *Phyllis D. v. Salvatore D,* 79 Misc. 2d 6. *Matter of Seaman,* 275 A. D. 484, Affirmed, it says. 300 N. Y. 756. I think that is correct. And also, *Ely v. Stone,* 173 Misc. 117. There is a citation of a well known brief—

The Court: I think we should put that in. That is Judge Weinstein.

Mr. Doering: Yes. New York Civil Practice. The number is 4519.22.

The Court: I am going to receive it. I reflected upon it and read the case, and I don't see any harm in its content.

Mr. McGinn: I don't see it either, but could I have a ruling from you.

The Court: I am going to allow it. We have not gotten any conversations yet. I don't quite follow it yet.

Mr. McGinn: The reason also on the introduction of that letter is, that I don't want to waive any right.

The Court: I will receive it.

(Defendant's Exhibit H for identification received in evidence.)

The Court: What is the date again?

(249) The Witness: September 10, 1963.

The Court: Thank you.

Mr. Doering: Your Honor, I want to say that I have told Mr. McGinn I am now about to ask Mr. Beeman some questions, which Your Honor has indicated you are going to forbid the answers to, because of the Dead Man's Statute, as a foundation for an offer to prove.

The Court: Yes. I had several days to think about it. It looks like the direct situation where the Dead Man's Statute, as much in any commentators deplore its use, has to be used under our Federal Rules, that Mr. McGinn refers to as 600 or something.

Mr. Doering: I understand Your Honor's position on that.

The Court: Well what I am going to allow you to do, I could wait until you ask the questions—I am going to allow you on the Rule 103b to make your offer proof, this is something that I don't usually do—I am telling you what my ruling will be, and I have not even heard your question yet, but put it in question and answer form so it will be part of this record.